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OVERSIGHT OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

HEARINGS

BEFORE THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

EXAMINING THE DEVELOPMENT AND PROMULGATION OF SAFETY AND HEALTH STANDARDS AND THE ENFORCEMENT OF THESE STANDARDS BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

APRIL 18, 19, AND 20, 1988

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OVERSIGHT OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

MONDAY, APRIL 18, 1988

U.S. Senate,
Committee on Labor and Human Resources,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman) presiding.

Present: Senators Kennedy, Simon, and Pell.

OPENING STATEMENT OF SENATOR KENNEDY

The Chairman. We will come to order. This afternoon's hearing launches the first set of Senate oversight hearings held on the Occupational Safety and Health Administration in seven years.

It is an article of faith in this country that workers should not have to spill their blood to earn their daily bread. And that simple principle led, 19 years ago, to the introduction of S. 2193, which created the Occupational Safety and Health Administration.

I was an original cosponsor of that bill. In the 19 years since, an estimated one million workers have died from diseases contracted in the workplace.

This estimate does not even count the tens of thousands of workers who have lost their lives from dramatic injuries caused by unsafe jobs.

And in those 19 years, while thousands of fathers and mothers, sons and daughters, succumbed to industrial disease, the agency responsible for protecting their lives has issued only 19 health standards to protect them from exposure to the substances that cut short their lives.

That record is sad enough, but the record in the last eight years is beyond mere grief. This Administration has issued only a handful of health standards in its tenure. But most of these have been issued because the Federal courts have forced the Administration to do so.

The ethylene oxide standard was issued under court compulsion in June of 1984.

The field sanitation standard was issued under court order in May of 1987.

The benzene standard was issued under court order in September of 1987.

The formaldehyde standard was issued under court order in December of 1987.

And in the past few days a standard for short-term exposure to ethylene oxide was issued under court order.

In fact, the court had threatened to hold the agency in contempt before the agency would act.

Only two standards have not been issued under court compulsion, and one of these, the hazard communication standard, was broadened by the agency under court order.

The record in safety standards is even worse. Hazards that have taken thousands of lives have not even been addressed by agency standards.

For years, the Congress and the experts have warned that the enforcement policies pursued by this Administration would cause industries to lie about the number of workers killed and injured on the job in order to avoid inspections.

After issuing heavy fines to some companies found to have distorted their records, the agency has only a few days before these hearings were scheduled admitted the futility of its procedure and repealed it.

The record will show that the decision to let workers die while waiting on a standard or an inspection has been supervised or carried out by the highest levels of this Administration.

The record will show that the Administration has deliberately created a superstructure of procedural barriers to the creation and enforcement of safety and health standards.

And the record will show that only under the threat of Senate investigation and court order will this Administration do what Congress intended—to protect the health and safety of workers.

We will hear from experts who oversee this agency; from dedicated professionals who work for it; from workers who have lost the protection the law once afforded them; and from some of those who are responsible for this agency in the next few days.

We hope that this record will give the Congress guidance on the policies it must pursue. No Administration should never again implement an ideology that permits workers to die because bureaucrats would not do their job.

We will insert Senator Simon's opening statement at this point.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator Simon. Mr. Chairman, I am pleased today that we begin oversight hearings on the Occupational Safety and Health Administration. Nearing the end of the second decade of OSHA's existence, we need to take a careful look at the agency and its impact on workplace safety and health. Before the passage of the Occupational Safety and Health Act in 1970, there were many Federal laws tailored to the health and safety of specific workers, such as longshoremen, miners, nuclear energy workers, employers performing on government supply and service contracts, construction workers, and railroad employees. The passage of the OSH Act culminated more than twenty years of interest and drive to enact a single comprehensive safety and health law applicable to workers in industries not covered by these other laws. Efforts began in 1948 when President Harry S Truman called the first "Presidential Conference on Industrial Safety." Similar conferences continued throughout the Eisenhower Administration and in 1951, Senator Hubert H. Humphrey introduced a bill providing for uniform national health and safety codes and uniform enforcement standards. This bill, like others before the OSH Act, died in committee. Our country made an historic step forward in the passage of the OSH Act in 1970. Now we need to look carefully at this agency to ensure that its original purpose—the protection of the American worker—is carefully administered. One must wonder today, looking at the statistics of the last eight years, whether OSHA is indeed protection our country's workers. Since 1980, OSHA has published only six health standards, all of which were finally published only as a result of a court order or a petition to the Department of Labor for emergency action. In each case where a standard has been subject to court scrutiny, the court has told OSHA to go back to the standard and make it stronger. There are only 850 inspectors to enforce the regulations covering 65 million employees in the United States. The Federal government spends only $3.60 per worker for health and safety—hardly what the health and safety of our workers is worth. Since 1980, there has been no real health and safety program in existence, no priorities for enforcement of standards for the protection of our workers, a lack of leadership in policies to strengthen that enforcement, and too few staff to carry out what policies are made.

Mr. Chairman, I thank you for your leadership in holding these hearings, and I look forward to the next three days and the information which will be imparted.

The CHAIRMAN. Senator Pell.

Senator PELL. I would just like to congratulate the Chairman for holding this necessary hearing and one that I think will have good results.

The CHAIRMAN. Our first witness this afternoon, Mr. Lynn Williams, President of United Steelworkers. The steelworkers have been a strong advocate of protecting the health and safety of workers.

We welcome you back to this committee, President Williams. And we know that on this issue, as on so many others, you have been in the forefront of protecting both the health and safety as well as the jobs of not only your workers, but of other workers in America.

We are delighted to welcome you to this committee, and look forward to your testimony.

STATEMENT OF LYNN WILLIAMS, CHAIRMAN, AFL-CIO STANDING COMMITTEE ON SAFETY AND OCCUPATIONAL HEALTH, AND PRESIDENT, UNITED STEELWORKERS OF AMERICA, WASHINGTON, DC, ACCOMPANIED BY MARGARET SEMINARIO, ASSOCIATE DIRECTOR, DEPARTMENT OF OCCUPATIONAL SAFETY, HEALTH AND SOCIAL SECURITY, AFL-CIO

Mr. WILLIAMS. Well, thank you very much, Senator. We very much appreciate the opportunity to be here, and congratulate you on the initiative you have taken in holding these hearings.

As well as being here as president of the Steelworkers, I am also pleased to be here as the chairman of the AFL-CIO Standing Committee on Safety and Occupational Health.

I am accompanied by Margaret Seminario, the associate director of the AFL-CIO's Department of Occupational Safety, Health and Social Security. And we are pleased to have this opportunity to present our views.

As you mentioned it has been over eight years since this committee last reviewed the state of safety and health protection for American workers. And this is a review that is long overdue.

In 1970 the passage of the Occupational Safety and Health Act brought hope to American workers that workplace death, injury and disease would finally be abated. Tragically, the promise of OSHA to assure every American worker a safe and healthful place of employment has never been fulfilled.

Where OSHA has taken action, it has made a difference in workplace fatalities and exposure to toxic substances like lead, cotton dust and asbestos, have been reduced.

But efforts have been limited and unsustained, and today, millions of workers remain at serious risk of injury and disease.

During the past eight years, under the Reagan Administration, OSHA has abandoned its commitment to protect the safety and health of American workers. Instead of improvements in protections, the record is one of refusal to set standards, weakened enforcement, and cutbacks in budget and personnel.

My submitted testimony will deal with the subjects of OSHA standard setting enforcement and budget and resources. I will limit my remarks this afternoon to a summary of these issues, and the actions necessary to improve safety and health protections for American workers.

OSHA's standard setting record has been extremely disappointing. Since the passage of the act the agency has issued only 19 new health standards, covering 25 hazards and 26 safety standards.

As a result the vast majority of workplace safety and health standards are subjected only to outdated consensus standards adopted shortly after the passage of the law; or no standards at all.

In the 1970s, OSHA succeeded in issuing strict comprehensive standards for major hazards, such as asbestos, vinyl chloride, coke oven emissions, cotton dust, lead, arsenic, and a number of other cancer-causing substances.

Unfortunately, in 1981, the Reagan Administration changed sides in the fight to protect worker safety and health. Actively committed to a program on deregulation, the Reagan Administration scrapped all projects underway for new regulation, including a proposed right-to-know standard on chemical hazards.

Standard setting activities on well documented cancer hazards, like cadmium, chromates, nickel and asbestos, were abandoned. Instead, the Administration focused on weakening or revoking existing standards like lead and cotton dust.

Fortunately, aided by court opinions, Congressional intervention, public opinion, and in some cases, industry support, the labor movement was able to stop or defuse most of the planned deregulatory initiatives, and slowly force the Administration to focus on hazards in need of stricter limitation.

Since 1981, OSHA has set new health standards on ethylene oxide, hazard communication, asbestos, field sanitation, benzene and formaldehyde.

However, each of these standards has come about as a result of union petitions, court orders, or political pressure. Absent court action, OSHA has largely been nonresponsive. Petitions for standards usually receive no response for months or years.

For example, OHSA has yet to respond to a petition for a standard on wood dust, to protect workers against cancer and allergenic hazards, submitted by several unions in June, 1985.

Today, there is still no standard to limit wood dust exposure.

As bad as OSHA has been on health hazards, the agency's track record on setting safety standards is even worse. Since 1981, OSHA has issued only six new standards for safety hazards.

Standards have been promised for years on a wide range of safety hazards, like confined space entry, lock out entrenching. But the agency seems to have neither the will nor the capability to bring these rulemakings to conclusion.

Interference by the Office of Management and Budget has furthered hindered OSHA's standard setting of standards. OMB, often at the behest of industry, has attempted to block or weaken regulations not to its liking, even where there is a clear need for regulatory action.

OMB has weakened standards on grain handling, and blocked an OSHA standard on high hazard chemical control, designed to prevent catastrophic releases.

More recently, OMB, citing authority under the paperwork reduction act, has broadened its intervention, and attempted to keep parts of OSHA final standards on hazard communication and formaldehyde, and has ordered OSHA to change the standards.

Two weeks ago the unions went to court to challenge OMB's interference with OSHA's hazard communications standard, an action that hopefully will restrict other unwarranted interventions by OMB as well.

The Reagan Administration's focus on deregulation and lack of commitment to worker protection has had a high toll. Today OSHA has neither the capability nor the will to respond to the regulatory task at hand.

With the range and number of hazards in need of regulation, major reforms in OSHA's standard setting activities are necessary if real progress is to be made.

First, the agency and the next Administration must make a commitment to developing and issuing regulations for major workplace hazards, and establish clear priorities for regulations.

The agency must also move to develop regulations to cover groups of chemicals with similar health hazards or uses, and generic rules on aspects of work site safety and health programs, like environmental monitoring and medical surveillance.

Like standard setting, enforcement is a cornerstone of the OSHA program. In drafting the OSHA act, Congress determined that voluntary compliance would not bring about sufficient improvements in workplace conditions, and instead, determined that a system of government inspection with mandatory citations and penalties was necessary.

The Reagan Administration, unfortunately, has chosen to ignore this basic thrust of the law. In 1981 as part of its larger deregulatory efforts, the Administration set out to systematically emasculate enforcement of OSHA.

Policies were implemented which exempted the majority of employers from routine OSHA safety inspections, based on their injury rates and injury records.

These polices were maintained for more than six years, despite clear evidence that employee injury records grossly underestimated the real number of injuries occurring.

For firms subject to OSHA inspections, the impact of enforcement actions was also minimum. In 1982, a policy was implemented which required citations for multiple violations of standards to be grouped, and reduce the level of seriousness of particular kinds of violations and penalties for violations.

In addition to these formal policy changes, other direct and indirect messages were sent to OSHA's field staff, making it clear that strong enforcement actions would not be favorably received by OSHA's top management.

For example, a requirement was imposed for penalties greater than $10,000 to be reviewed by the national office before issuance.

As a direct result of these policies, OSHA enforcement activity plummeted. The number of serious citations issued fell by 41 percent, and the number of wilful violations by 91 percent.

Total penalties proposed for violations fell from $25.5 million to $5.6 million, a drop of 78 percent.

As a result of several well publicized cases, including chemical leaks at the Union Carbide, Institute, West Virginia plant, which was exempted from inspections, minor changes were made to OSHA inspection policy.

Several weeks ago, after years of criticism, and facing these Congressional oversight hearings, OSHA finally changed its records review exemption policy. Now, the agency will look at employer programs to conduct a walk-through of high hazard areas to determine whether to conduct a full scale inspection.

In the last year and a half, OSHA has taken major enforcement actions against some employers, and issued record penalties for violations.

The majority of these actions have been for record-keeping violations, although recently, violations for hazards have also been the subject of stronger enforcement action.

The majority of these strong enforcement actions are not a result of a change in policy, but have come in response to a tragedy, a union complaint, or where there was a particularly aggressive inspector or area director.

In the past year another problem has emerged in the number of cases involving major OSHA enforcement action: The settlement of cases without union involvement or adequate assurance of abatement.

In an attempt to resolve major enforcement cases with employers, the Department of Labor solicitor's office, at the national level, has negotiated settlements with corporate officials, excluding the unions involved in the case from the discussion.

These settlements not only exclude the union, but also have failed to include adequate provisions to ensure proper abatement.

In one case the Department of Labor entered a settlement agreement with Scott Paper, without the union's involvement, which reduced penalties for record-keeping citations, and eliminated penalties for hundreds of safety violations that were not yet issued.

The company made no agreement not to contest the safety violations, or abate the cited hazards.

Several weeks after the settlement agreement was signed, Scott Paper contested all the safety violations.

As a result of OSHA enforcement policies, and limited inspection resources, none of the industrial sectors under OSHA's jurisdiction are receiving the kind of enforcement they require.

In manufacturing the number of inspections has declined by 36 percent since 1980. In Fiscal Year 1987 there were only 8,258 program inspections conducted by Federal OSHA in the manufacturing industry.

In Fiscal Year 1987 OSHA conducted nearly 35,500 construction inspections, but this translates into only 4,500 to 5,000 construction sites inspected, covering only 318,000 workers.

Perhaps the biggest losers in OSHA's enforcement activities are workers in industries outside of manufacturing and construction, where 75 percent of the work force is employed.

Many industries and job sites, such as hospitals, hotels, and utilities, have high injury rates and major hazards.

In Fiscal Year 1987 OSHA conducted only 1,125 programmed inspections in these non-manufacturing industries.

Given the number and range of workers and hazards for which OSHA has responsibility, developing an effective enforcement program is admittedly an extremely difficult task, and the best use of limited OSHA inspection resources will always be subject to debate.

However, from discussion with industry counterparts, it does appear that there are agreements on some general principles that should be explored.

First, as a matter of policy, no industry or employer should be automatically exempted from OSHA inspection.

Second, OSHA should develop a system of uniform enforcement, and take strong action against employers for serious and wilful violations of the law.

And third, OSHA needs to do a better job targeting its inspections, and should make better use of data to determine which employers and operations to inspect.

The Occupational Safety and Health Administration is charged with a herculean task to implement a program of safety and health protections for the majority of American workers. More than 5.9 million firms across a wide range of industrial sectors are subject to the act's requirements.

Currently 4½ million of these firms, employing 65 million workers, are covered by Federal OSHA. The numbers of hazards of concern are vast, with new hazards being identified on a regular basis.

The resources available to OSHA to meet its responsibilities have always been small, particularly when compared to the task facing the agency. In Fiscal Year 1987 OSHA had a budget of $228 million, and 2,131 authorized positions.

In Fiscal Year 1988, the budget increased to $235 million, and 2,352 positions, as a result of the California State plan being returned to Federal jurisdiction.

Since 1980 OSHA has suffered about a 25-percent cut in budget and personnel level. Today, Federal OSHA has fewer than 850 inspectors on staff, conducting workplace inspections. And the Federal Government spends just $3.50 to protect the health and safety of each worker covered by the law.

The Occupational Safety and Health Administration is failing to do its job to protect the safety and health of American workers. Eight years of the Reagan Administration's policies to weaken standards in enforcement, and cut budget and staffing levels, have left an empty shell of a program.

Scores of serious and life-threatening hazards are unregulated. No group of workers or industries is receiving the kind of attention from the agency that is necessary or deserved.

The AFL-CIO believes major improvements in OSHA can be made, and progress in worker protection achieved. Some improvements will only come, however, with the commitment by the next Administration to an active and forward looking government role in worker protection efforts.

Even with Administration reforms, the AFL-CIO believes it is time to consider legislation to update and improve the Occupational Safety and Health Act. Seventeen years have passed since the enactment of OSHA, and the last has never been amended.

Experience has shown deficiencies in the law where legislative changes could benefit worker protection. Forms are needed to expand protection to workers currently not covered; to expedite standard setting; and to require worker training and education.

The Act's penalty structure and criminal provisions are out of date and must be strengthened. Union and worker participation should be a cornerstone of all workplace safety and health programs.

Safety and health committees should be mandated with the right to inspect workplaces, shut down dangerous jobs, and review employee hazard control measures.

There may not be total agreement on these OSHA reform measures. The AFL-CIO believes, however, that the time is ripe to start discussing possible areas of reform, and exploring ideas for improved protection.

These oversight hearings on OSHA are an important first step for laying the foundation for Administration and legislative reforms. We look forward to the committee's continued involvement in developing new initiatives for further improvements in worker safety and health protections.

Thank you.

[The prepared statement of Mr. Williams follows:]

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TESTIMONY OF LYNN WILLIAMS, VICE PRESIDENT, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND PRESIDENT, UNITED STEELWORKERS OF AMERICA, BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES, ON OVERSIGHT OF THE OCCUPATIONAL SAFETY AND HEALTH ACT

April 18, 1988

Mr. Chairman, my name is Lynn Williams. I am President of the United Steelworkers of America, and Chairman of the AFL-CIO Standing Committee on Safety and Occupational Health. I am pleased to have the opportunity today to appear before this Committee to present the views of the AFL-CIO on the Occupational Safety and Health Act.

It has been over 8 years since this Committee last reviewed the state of safety and health protections for American workers, a review that is long overdue.

Workplace safety and health is literally a life and death issue for American workers. Every year 7,000-10,000 workers are killed from traumatic injuries on the job and tens of thousands more die from the long-term effects of occupational diseases.

In 1970, the passage of the Occupational Safety and Health Act (OSHAct) brought hope to American workers that workplace death, injury, and disease would finally be abated.

Tragically, the promise of OSHA--to assure every American worker a safe and healthful place of employment--has never been fulfilled. Where OSHA has taken action, it has made a difference and workplace fatalities and exposures to toxic substances like lead, cotton dust, and asbestos have been reduced. But the efforts have been limited and unsustained, and today millions of workers remain at serious risk of injury and disease.

During the past 8 years, under the Reagan Administration, OSHA has abandoned its commitment to protect the safety and health of American workers. Instead of improvements in protections, the record is one of refusal to set standards, weakened enforcement and cutbacks in budget and personnel. At a time when the safety and health concerns of workers, employers and the public have been growing, OSHA has abdicated all leadership becoming largely irrelevant to the public policy discussion on these issues.

As a result of OSHA's inaction, there is an overwhelming backlog of hazards to be addressed, enforcement programs are ineffective and fail to reach industries and worksites where major hazards exist, and budget and resources are grossly inadequate to address the task at hand.

The next several years will be critical to determining the future for safety and health protections for American workers. If OSHA continues to languish, its effectiveness will be further diminished and any hope of real progress lost. However, with a renewed commitment to worker protection, the AFL-CIO believes significant improvements and gains can be made.

This testimony will highlight the key deficiencies in standard setting, enforcement programs, and agency budget and resources and set forth the measures the AFL-CIO believes are necessary to put our national safety and health program back on track and to start moving in a forward direction.

A. Standard Setting

1. OSHA Standard Setting History and the Reagan Administration

The setting of safety and health standards is the heart and soul of the OSHA law. Under the Act, OSHA is mandated to establish legally binding standards designed to provide a high degree of protection to workers at risk.

Unfortunately, OSHA's standard setting record has been extremely disappointing. Since the passage of the Act, the agency has issued only 19 new health standards covering 25 hazards and 26 safety standards (Table 1 and Table 2). As a result, the vast majority of workplace safety and health hazards are subject only to outdated consensus standards adopted shortly after the passage of the law, or no standards at all.

In it's early years, OSHA's standard setting activities were hindered by the lack of both experience and a competent staff with no clear direction on how to fulfill the agency's mission. In the mid to late 1970's industry opposition to any form of regulation, as well as increased litigation and White House review procedures, further burdened the agency's regulatory activities. Nonetheless, between 1975 to 1980, OSHA succeeded in issuing strict comprehensive standards for major hazards such as coke-oven emissions, cotton dust, lead, arsenic, and a number of other cancer-causing substances.

By 1980, after ten difficult years, it appeared that OSHA's role in standard setting was finally established and accepted by the majority of industry as a legitimate and necessary activity.

Unfortunately, in 1981, the Reagan Administration changed sides in the fight to protect worker safety and health. Actively committed to a program of deregulation, the Reagan Administration scrapped all projects underway for new regulation, including a proposed right-to-know standard on chemical hazards. Standard-setting activities on well-documented cancer hazards like cadmium, chromates, nickel, and asbestos were abandoned.

Instead the Administration focused on weakening or revoking existing standards that had already been issued. Taking direction from President Reagan's Task Force on Regulatory Relief and the Office of Management and Budget, weakening standards on cotton dust, lead, noise, and OSHA's cancer policy became top priority. The Administration went so far as to ask the Supreme Court to cease review of the lead and cotton dust standards, a review that ultimately upheld these important worker protection rules.

Fortunately, aided by court opinions, Congressional intervention, public opinion and in some cases, industry support, the labor movement was able to stop or diffuse most of the planned deregulatory initiatives and slowly force the Administration to focus on hazards in need of stricter regulations. Broad based labor and community coalitions in the states and localities fought for and won state right-to-know laws on toxic chemicals, forcing a federal standard in 1983 and setting the stage for further regulations.

2. Health Standards

Since 1981, OSHA has set new health standards on ethylene oxide, hazard communication, asbestos, field sanitation, benzene, and formaldehyde. However, each of these standards has come about as a result of union petitions, court orders or political pressure (see Table 3).

For example, in 1981, OSHA was petitioned by the Health Research Group, the Amalgamated Clothing and Textile Workers' Union (ACTWU), the American Federation of State, County, and Municipal Employees (AFSCME) and other unions to issue an emergency temporary standard for ethylene oxide (ETO), a sterilizing agent which poses cancer and reproductive hazards. OSHA refused to act until 1983 when the Court of Appeals for the District of Columbia ordered the agency to issue an ETO standard within a year. A similar course of action, petitions and court review, was required to force the agency to issue standards on formaldehyde, benzene, and farm worker field sanitation facilities.

Even where the agency has acted, the standards issued have often failed to provide adequate protection. In every recent case where a standard has been challenged in court (ethylene oxide, hazard communication, and asbestos), the courts have found the standards lacking and ordered the agency to take further steps to increase the protection afforded to workers.

Absent court action, OSHA has largely been non-responsive. Petitions for standards usually receive no response for months or years. A September 1986 union petition for emergency standard on the infectious blood-borne diseases AIDS and Hepatitis B received no response for nearly a year. Finally, in October 1987, OSHA did respond and turned down the petition.

OSHA has yet to respond to a petition for a standard on wood dust to protect workers against cancer and allergenic hazards submitted by several unions in June 1985. This resistance is particularly troublesome because since the petition was filed, the Occupational Safety and Health Review Commission has ruled that the OSHA nuisance dust standard cannot be applied to organic dusts, including wood dust, meaning there is no legal limit on exposure. In July 1987, NIOSH in response to OSHA's request transmitted a comprehensive review document on wood dust hazards, but still OSHA has not responded to the unions' petition.

OSHA's lack of responsiveness is not limited to the petitions from the labor movement. Recommendations for standards from NIOSH and referrals from EPA's Toxic Substance Program on chemicals like the carcinogen MBOCA, lay dormant for years at OSHA. Results from bioassays from the National Toxicology Program or epidemiology studies from NCI and NIOSH receive no systematic review or response. Alerts or bulletins on new hazards and control measures are not issued on a routine basis.

Fortunately for the first time in OSHA's history there appears to be consensus between the government, industry and labor that OSHA's standards for toxic substances are out of date and inadequate. OSHA's proposed solution to this problem, however, is try a quick fix and update permissible exposure limits (PELs) through largely a wholesale adoption of recommended standards of the private consensus organization the American Conference of Governmental Industrial Hygienists (ACGIH). In pursuing this initiative OSHA has not evaluated which chemical hazards pose the greatest risk to workers nor set priorities for consideration. Moreover, OSHA has not attempted to determine if ACGIH values under consideration provide adequate protection for workers.

The OSHAct designated NIOSH, not private or industry consensus organizations as the primary source of standard setting recommendations. Reliance on consensus standards was specifically rejected by the Congress except as a temporary measure when the Act was first implemented in 1971. Yet in launching its "PEL Update" project, OSHA has ignored NIOSH and has only recently involved its sister agency at the insistence of NIOSH and the labor movement.

The AFL-CIO supports updating OSHA permissible exposure limits but believes the end result should be meaningful protection for workers, not a hollow action which may sound good in a press release, but in reality has little net benefit for workers. The AFL-CIO has proposed an alternate approach which would focus on those chemicals of major concern and set limits which are truely protective.

3. Safety Standards

As bad as OSHA has been on health hazards, the agency's track record on setting safety standards is even worse. Since 1981, OSHA has issued only six new standards for safety hazards. Standards have been promised on a wide range of safety hazards in both general industry and construction, but the agency seems to have neither the will nor the capability to bring these rulemakings to conclusion. Well-recognized hazards like confined space entry, failure to lock-out or de-energize equipment during service and repair, and faulty trenching procedures claim the lives of thousands of workers each year. Currently, there are no OSHA standards for confined space entry or lock-out and the trenching standards are largely unenforceable. New standards on these hazards have been under review or development since the 1970's, and have been promised since 1980 (Table 4). Yet today, a new trenching standard has yet to be issued and standards for confined space entry and lock-out have not even been proposed.

4. New Hazards

In addition to well-recognized health and safety hazards, OSHA has failed to take any action on "new hazards" associated with new industries or new technologies.

In recent years, employment in the health care sector has exploded. Today, nearly seven million workers are employed in this industry. The Bureau of Labor Statistics (BLS) injury rate reported for health care settings is significant (6.8 injuries per 100 workers), and this rate most likely understates the problem. Workers in this industry are exposed to highly toxic chemicals and biological hazards. Infectious diseases like the blood-borne diseases Hepatitis B and AIDS pose particular problems to health care workers. NIOSH estimates that each year 10,000-12,000 workers contract Hepatitis B from occupational exposures and that more than 300 health care workers a year eventually die of the disease. Despite this evidence and growing concern about AIDS exposure in health care settings, OSHA has refused to set standards to protect these workers.

Similar inaction has marked OSHA's response to hazards associated with poor job design. Ergonomic problems contribute significantly to back injuries, repetitive motion trauma, including carpal tunnel syndrome, and other musculoskeletal problems.

BLS reports more than 37,000 injuries from repetitive trauma and one million back injuries annually, numbers which likely underestimate the problem, resulting in high compensation costs and loss of productivity. Yet OSHA has no standards or regulatory actions underway to address these problems. In fact, the agency has only one professional ergonomist on staff to address job design problems.

For office workers, computers and video display terminal use have totally changed the nature of their jobs. Today, more than 25 million VDT's are in use, and an estimated 40 million workers will use the equipment routinely by the year 1990. Excessive use of VDT's and improper design of equipment and workstations causes eye problems and musculoskeletal problems, including carpal tunnel syndrome. Reproductive hazards are also a concern. Despite the widespread use of VDT equipment and documented health problems, OSHA has taken no action to assure that such equipment is used properly. OSHA's inaction is in direct contrast to the response of Scandinavian and European countries which have issued standards and guidelines on the use of VDT equipment.

5. OMB Interference

Interference by the Office of Management and Budget has also hindered the setting of standards under the Occupational Safety and Health Act. In 1981, President Reagan issued Executive Order 12291 which authorized the Office of Management and Budget (OMB) to review draft proposed and draft final agency regulations. OMB often at the behest of industry has used this review authority to block or weaken regulations not to its liking, even where there is a clear need for regulatory action. In 1983, an OSHA proposed safety standard for grain handling facilities was held by OMB for more than a year. The proposal was only cleared after OSHA weakened the provisions for grain dust control in grain elevators. OMB's continued objections resulted in the promulgation of a final grain handling standard in 1987 that also fails to adequately control dust accumulations.

Under another executive order, E.O. 12498, OMB has blocked regulatory actions from OSHA's regulatory agenda, thereby preventing consideration of these initiatives. In one such action, OMB blocked an OSHA regulation on high hazard chemical control which OSHA was considering in response to the Bhopal chemical disaster and other chemical accidents in this country. Both the industry and unions supported such a rule and OSHA even developed and distributed a draft rule for comment. However, in 1985, OMB refused to permit OSHA to put the rule on its regulatory agenda and all work on the rule halted. As a result, today there are no specific standards in place to prevent major catastrophic releases of high hazard chemicals.

More recently, OMB has broadened its intervention in OSHA rulemaking through its review procedures under the Paperwork Reduction Act. Under the paperwork law, OMB is authorized to review provisions of proposed and final rules and other agency actions that impose a paperwork burden on employers and to grant approval for these provisions. OMB has defined "paperwork" and its authority under the law very broadly. For OSHA rules OMB has considered such requirements as medical exams and exposure monitoring of toxic substances, which are specifically mandated by the OSHA law, to be "paperwork." On several occasions, the budget office has attempted to force the agency to modify these requirements in its standards. More recently OMB has gone so far as to order OSHA to change labelling provisions of its formaldehyde standard and material safety data sheet provisions in the OSHA Hazard Communication Standard, and has threatened to keep other aspects of these final standards from going into effect until the changes are made. In both of these cases, OMB's objections are not based upon paperwork burden, but in fact a disagreement over the substance of the standard and policy decisions that have been made by OSHA. Two weeks ago, the unions went to court to stop OMB's interference in OSHA's Hazard Communication Standard; an action that hopefully will restrict other unwarranted intervention by OMB as well.

Over the past 7 years, OMB has become an informal "court of appeals" for industry and other interest groups and a super regulatory agency that operates outside the normal rule-making procedures. OMB intervention in agency activities is often undocumented, its influence seen only in the results in proposed or final regulations.

OMB has no technical expertise in occupational safety and health, but as a routine matter of course attempts to substitute its judgement for OSHA's. Responding to OMB's demands requires substantial time and resources by OSHA, time that could be directed towards developing new regulations. The net result of OMB involvement is not better regulations, but weakened and delayed protections for American workers.

6. Recommendations for Action

The Reagan Administration's focus on deregulation and lack of commitment to worker protection has had a high toll. Today, OSHA has neither the capability nor will to respond to the regulatory task at hand. The Administrative Conference of the United States, a group expert in regulatory procedures concluded after extensive review that OSHA has neither a system for priority setting nor management, or the resources to tackle its standard setting responsibilities.

OSHA's standard setting task, always formidable, has become overwhelming and there is a huge backlog of hazards sorely in need of better standards.

With the range and number of hazards in need of regulation, major reforms in OSHA's standard setting activities are necessary if real progress is to be made.

First, the agency and the next administration must make a commitment to developing and issuing regulations for major workplace hazards. To that end the agency must develop clear priorities for standard setting and a management system that makes it possible to significantly reduce the time for standards development. For several years the AFL-CIO has proposed to OSHA that the agency convene a consensus conference of labor, industry and government representatives to attempt to agree on priorities for regulations. Unfortunately, the suggestion has fallen on deaf ears.

The agency must move to develop regulations to cover groups of chemicals with similar health hazards or uses and generic rules on aspects of worksite safety and health programs. The current substance-by-substance approach by itself will never result in adequate protection in a timely fashion. The OSHA Hazard Communication Standard is one example of "generic rules." Other generic regulations should be developed which address environmental monitoring, medical surveillance, worksite inspection and compliance plans, and education and training. Such regulations would foster the development of better safety and health programs at the worksite and bring about improved protections for workers. The AFL-CIO believes that OSHA has the authority to issue generic standards and other broad based rules under the current law. Specific Congressional direction through legislation could speed up the development of such regulations.

B. Enforcement

1. Exemption Policies and Weakened Enforcement

Like standard setting, enforcement is a cornerstone of the OSHA program. In drafting the OSHAct, Congress determined that voluntary compliance would not bring about sufficient improvements in workplace conditions, and instead determined that a system of government inspection with mandatory citations and penalties was necessary.

The Reagan Administration unfortunately has chosen to ignore this basic thrust of the law. In 1981, as part of its larger deregulatory efforts, the Administration set out to systematically emasculate enforcement of the OSHAct.

Unlike standard setting which requires notice and comment rulemaking and is subject to court review, changes in enforcement policy are accomplished by fiat through administrative directives. From 1981 to 1983, the Reagan Administration radically altered OSHA enforcement policies limiting the number of employers subject to OSHA inspections and reducing citations and penalties for violations of the law.

Policies were implemented which exempted the majority of employers from routine OSHA safety inspections. Routine inspections were scheduled only in manufacturing, construction, maritime and a few other industries selected for special emphasis programs. Workplaces in all other sectors (e.g., service, transportation, utilities, telecommunications, etc.) were not scheduled for any routine safety inspections.

Within the manufacturing sector, all industries with a lost workday injury rate less than the private sector national average were automatically exempt from routine safety inspections. For industries still covered, firms were exempted if their individual injury records demonstrated a low lost workday injury rate. The net result of this policy was to exempt 86 percent of all manufacturing employers from routine safety inspections.

Policies on complaint inspections and follow-up inspections abatement were also significantly altered in 1982. Area offices were directed to screen worker complaints and inspection requests more closely and not to conduct inspections if complaint items did not appear to be serious hazards. Instead of workplace inspections, letters were sent to employers advising them of the complaint and requesting a response from the employers. On follow-up inspections to assure hazard abatement and compliance, an arbitrary quota of 5 percent of all inspections was imposed. Thus, area officers were prevented from routinely following up cases involving serious hazards. In one such case, Pymm Thermometer in Brooklyn, New York, OSHA's failure to follow up on serious mercury hazards resulted in continued exposure and poisoning of workers for several years.

For firms subject to OSHA inspections, the impact of enforcement actions was also minimized. In 1982, a policy was implemented which required citations for multiple violations of standards to be grouped and reduced the level of seriousness of particular kinds of violations and penalties for violations.

In addition to these formal policy changes, other direct and indirect messages were sent to OSHA's field staff making it clear that strong enforcement actions would not be favorably received by OSHA's top management. For example, a requirement was imposed for penalties greater than $10,000 to be reviewed by the national office before issuance and job performance criteria applied that resulted in a negative rating for a high rate of contests of inspection results.

As a direct result of these policies, OSHA enforcement activity plummeted. From FY 1980 to FY 1983, the number of workplace inspections conducted by the agency declined by 8,000 and the number of workers covered by inspections fell from 3.7 million to 2 million. The number of serious citations issued fell by 41 percent, and the number of willful violations by 91 percent. Total penalties proposed for violations fell from $25.5 million to $5.6 million, a drop of 78 percent (Table 5).

The deficiencies in the Reagan Administration enforcement policies quickly became apparent as serious injuries, accidents and poisonings occurred in plants OSHA had designated as "safe" and not in need of inspections. These "safe" plants included the Union Carbide Institute West Virginia plant, the sister facility to Carbide's Bhopal, India plant, and an Oklahoma fire workers plant where an explosion killed 22 workers in 1985. Neither of the facilities had been subject to routine safety inspections because according to OSHA's policy these industries were "safe" and not in need of inspections.

Similarly, in 1983 an immigrant worker, Stephan Golab, died of cyanide poisoning at the Chicago Film Recovery plant, a case that became particularly noteworthy when the management of the firm was convicted for murder by an Illinois court. A few weeks prior Mr. Golab's death, OSHA had visited the plant but failed to conduct an inspection because workplace records showed a low injury rate. OSHA never became aware of the plant conditions and the cyanide hazard because an actual inspection was not conducted.

2. Changes in Enforcement Policy

As a result of these cases, from 1985-1986, minor changes were made to OSHA inspection policies. On every tenth record review visit, OSHA conducted an actual inspection regardless of the employers' injury record. Non-manufacturing industries and low injury rate manufacturing industries also were designated to receive a limited number of general schedule safety inspections. And area directors were permitted to cite multiple instances of similar violations and to issue maximum penalties in cases they consider to be particularly egregious.

Several weeks ago, after years of criticism and facing these Congressional oversight hearings, OSHA finally changed its records review exemption policy. Now the agency will look at employer programs and conduct a walk-through of high hazard areas to determine whether to conduct a full scale inspection.

The AFL-CIO welcomes this change in policy. It is long overdue. Unfortunately, for workers like Stephan Golab at the Chicago Film Recovery Plant, and workers at the John Morrel Plant in Sioux Falls, South Dakota, the change in policy is too late to prevent the poisoning or injuries that occurred because their plants were not inspected under the agency's exemption policy.

In the last year and a half, OSHA has taken major enforcement actions against some employers and issued record penalties for violations. The majority of these actions have been for recordkeeping violations, although recently violations for hazards have also been the subject of stronger enforcement actions. These well publicized large fines and major citations have led some to believe that OSHA has gotten tough and aggressive about enforcing safety and health standards. But upon closer examination, it is clear that the majority of strong enforcement actions have come in response to a tragedy, a union complaint, a situation subject to media attention or where there is a particularly aggressive inspector or area director.

In the case of particular standards that OSHA takes pride in such as the Hazard Communication Standard, characterized by OSHA as the most far reaching and important standard ever issued, enforcement activities are less than impressive. The Hazard Communication Standard has been cited thousands of times, indicating that employers still are not in compliance with the standard. But most of the violations have been cited as "other than serious" and the agency has employed no particular strategy or program to see that compliance is improved. Moreover, in May 1988, the standard goes into effect in non-manufacturing industries. Yet OSHA has not yet issued a directive to the field to prepare for enforcement in these industries.

Similarly, revised OSHA standards for asbestos were issued by the agency in 1986, including a standard crafted for the construction industry. The construction asbestos standard exempts "short-term work" from the full provisions of the standard, but the agency has yet to define in a program directive what constitutes short-term work. Thousands of construction workers like sheet metal workers are exposed to asbestos in short-term operations, but on a regular basis. When these workers complain to OSHA about a lack of protection, inspections generally are not scheduled or conducted until after the asbestos work is done.

For employers and workers, currently OSHA enforcement is largely the luck of the draw. The same hazards and same conditions are just as likely to be subject to weak enforcement with other than serious citations and small penalties, as a major enforcement action by the agency.

There has, in fact, been no guidance or directive to the

OSHA field staff urging strong enforcement or setting forth clear direction for uniform enforcement on serious hazards. Just the opposite is true. The same policies and directives to reduce citations and penalties largely remain in place. Moreover, OSHA's management system puts a premium on numbers of inspections, discouraging inspectors and area directors from taking enforcement actions which require more time and resources.

3. Settlements

In the past year another problem has emerged in a number of cases involving major OSHA enforcement actions: the settlement of cases without union involvement or adequate assurance of abatement. In an attempt to resolve major enforcement cases with employers, the Department of Labor Solicitor's Office at the national level has negotiated settlements with corporate officials excluding the unions involved with the case from the discussions.

Settlement discussions and agreements have considered not only citations already issued by the agency, but have been expanded to cover citations not yet issued by the agency.

These "pre-citation" and "post-citation" settlements not only exclude the union, but also have failed to include adequate provisions to assure proper abatement.

In one case, the Department of Labor entered a settlement agreement with Scott Paper without the union's involvement which reduced penalties for recordkeeping citations and eliminated penalties for hundreds of safety citations that were not yet issued. The company made no agreement not to contest the safety violations or to abate the cited hazards. Several weeks after the settlement agreement was signed, Scott Paper contested all the safety violations.

Union rights in OSHA settlements are limited under the law. Unions, however, do have full rights to elect party status and to participate in settlement discussions. We would hope and expect that OSHA's longstanding official policy to involve unions in informal conferences and settlement discussions would be followed by this Administration.

4. Inspection Coverage

As a result of OSHA enforcement policies and limited inspection resources, none of the industrial sectors under OSHA's jurisdiction are receiving the kind of enforcement they require.

In manufacturing, the number of inspections has declined by 36 percent since 1980, and records reviews still account for a significant number of inspections (Table 5). In FY 1987, there were only 8,258 programmed inspections conducted by federal OSHA in manufacturing industries in the 30 states where federal OSHA has jurisdiction (Table 6).

At first glance, OSHA's enforcement activities in the construction industry seem greater than other sectors. In FY 1987, OSHA conducted nearly 35,500 inspections in the construction industry, a 35 percent increase since FY 1980 (Table 5 and Table 6). But the number of inspections in the construction don't tell the real story. OSHA's method of defining and counting construction inspections greatly inflates their enforcement activity. Instead of counting each job site visited as an inspection, the number of contractors at a site is used for inspection counting purposes. Most sites average seven to eight contractors, meaning that in reality only 4,500-5,000 construction sites were visited with only 318,000 construction workers receiving the benefit of an OSHA inspection (Table 6).

Moreover, OSHA has no real system for targeting construction sites for inspections. The agency currently obtains no information from contractors prior to work or particular operations commencing, meaning it has no way to schedule inspections as needed. This is in direct contrast to the State of California where under the state OSHA plan contractors are required to notify the state of major construction jobs and seek permits for particularly hazardous operations.

OSHA enforcement efforts in the construction industry are further weakened by the lack of inspectors with experience and knowledge of the construction industry. The agency has few construction specialists on staff and relies upon its general safety inspectors to conduct inspections in all industries. As a result enforcement at both construction sites and other workplaces suffers.

Perhaps the biggest losers in OSHA's enforcement activities are workers in industries outside of manufacturing and construction. OSHA has historically directed most of its inspection resources to manufacturing and construction, which have high injury rates. However, in 1982, the agency decided to exclude all other sectors from its routine inspections. Many industries and job sites in these exempted non-manufacturing SIC codes, such as hospitals, hotels, and utilities have high injury rates and major hazards. Over one-half of all injuries occur in the sectors (Table 7). Moreover, these sectors of the economy have been growing and now employ more than 75 percent of the work force. In FY 1987, under current inspection policies OSHA conducted 1,125 programmed inspections in these non-manufacturing industries (Table 6). The number of complaint inspections and citation rates in these industries, however, shows that hazards in these industries are a significant problem and concern.

Workers in all these industries--manufacturing, construction, non-manufacturing and agriculture--are in need of greater enforcement efforts. But today, according to the agency's staffing documents, OSHA has only about 850 inspectors on staff, a reduction of 25 percent since 1980, and many of them are inexperienced or still in training.

The Reagan Administration has refused to request additional inspection resources, instead preferring to let workers and unions fight over where OSHA should direct its limited numbers of inspectors. The result is that no group of workers receives adequate protection.

5. Recommendations for Improved Enforcement

Given the number and range of workers and hazards for which OSHA has responsibility, developing an effective enforcement program is admittedly an extremely difficult task, and the best use of limited OSHA inspection resources will always be subject to debate.

However, from discussion with industry counterparts, it does appear that there are agreements on some general principles that should be explored. First, as a matter of policy, no industry or employer should be automatically exempted from OSHA inspections. Second, OSHA should develop a system of uniform enforcement and take strong action against employers for serious and willful violations of the law. And third, OSHA needs to do a better job targeting its inspections and should make better use of data to determine which employers and operations to inspect. Moreover, there is general recognition that OSHA inspection resources are woefully inadequate to do the job and that additional appropriations and personnel are needed.

The AFL-CIO believes that more efforts should be directed by OSHA to encourage and require activities at the worksite to recognize and abate hazards. Mandatory safety and health committees, requirements for employer safety and health programs and qualified personnel and increased education and training for employers and workers would greatly enhance worker protection measures.

Much could be done to improve OSHA enforcement if the agency were only willing to admit that problems existed and to dedicate itself to developing an effective program of strong enforcement.

In several areas, however, there are limitations in the legislation itself that reduce the effectiveness of OSHA enforcement. Provisions in the OSHAct for bringing about the abatement of hazards in a timely fashion are limited. Unlike their mine safety colleagues, OSHA inspectors are given no immediate authority to shut down dangerous and life-threatening operations, authority given by most municipalities to sanitarians and restaurant inspectors. Instead, OSHA must seek an injunction from the district court, an action the agency rarely takes.

Similarly, when OSHA cites an employer for a serious hazard, the agency has no authority to order abatement as long as there is an ongoing contest by the employers. Serious hazards can legally exist for years while the case is in litigation leaving workers at risk of injury and disease.

The OSHA penalty structure and criminal provisions are also limited and out-of-date. Every other safety and health and environmental law has stronger penalties and criminal provisions. Under OSHA, serious hazards may be subject to a maximum penalty of $1,000, an amount that provides little incentive for compliance. Criminal provisions may be applied only to those cases where a standard violation results in death, an employer falsifies records or advance notice of an inspection is given. Cases where workers are maimed or poisoned but no fatalities occur are outside the criminal provisions of OSHA. The AFL-CIO believes it is time for the Congress to evaluate these deficiences in the OSHAct and to consider legislative reforms to improve worker protection measures.

C. Budget and Resources

The Occupational Safety and Health Administration is charged with the herculean task to implement a program of safety and health protections for the majority of American workers. More than 5.9 million firms across a wide range of industrial sectors are subject to the Act's requirements. The numbers of hazards of concern are vast, with new hazards being identified on a regular basis.

The resources available to OSHA to meet its responsibilities have always been small, particulary when compared to the task facing the agency. In FY 1987, OSHA had a budget of $228 million and 2,131 authorized positions. In FY 1988, the budget increased to $235 million and 2,352 positions as a result of the California State plan being returned to federal jurisdiction (Table 8). Currently there are 65 million workers and 4.5 million firms covered by federal OSHA.

Of the total FY 1988 budget, $109.9 million, is earmarked for federal enforcement which now covers 30 states (including the State of California). State program enforcement is budgeted for $40.5 million and standard setting activity for $6.5 million. With this budget the agency annually conducts approximately 60,000 inspections and issues three to four safety and health standards.

The limitations in the OSHA budget are particularly clear when compared to the funding and staffing levels of its sister agency, the Mine Safety and Health Administration (MSHA). MSHA is responsible for conducting mandatory inspections in coal mines and metal and non-metal mines.

In FY 1987, 10,979 mines employing approximately 320,000 workers were in operation and subject to MSHA inspections. MSHA conducted 97,536 inspections in the industry. To carry out its responsibilities MSHA had a budget of $156.5 million and a staff of about 2,750. This level of resources translates into $489 spent for every worker covered. By comparison the OSHA budget amounts to $3.60 for workers subject to that Act (Table 9).

Like many other agencies, OSHA has been significantly effected by budget cuts during the Reagan Administration. In the last year of the Carter Administration in FY 1981, OSHA had a budget of $209 million and 3,015 full-time positions. In FY 1982, under the Reagan Administration, the budget was reduced to $195.5 million and 2,354 positions. This compares to the Carter Administration FY 1982 request for $242.6 million and 2,925 positions (Table 8).

Under the Reagan Administration, the OSHA staffing levels have been cut by approximately 25 percent including the number of inspectors. In FY 1980, the agency had 1,400 enforcement personnel on staff with 1,125 inspectors in the field with approximately 1,700 enforcement positions and 1,300 inspector positions authorized (Table 10).

By comparison at the end of FY 1987, the number of OSHA enforcement positions had been reduced to approximately 1,200, of which 970 were inspectors. However, during the Reagan

Administration, there has been a high number of vacancies. As of September 1987, there were fewer than 850 inspectors on board with 120 vacancies in inspector positions (Table 10).

OSHA has had a difficult time attracting and maintaining quality staff. Starting grades for industrial hygiene and safety positions are GS-5 or GS-7 depending upon educational background. Starting pay for those grades is only $15,118 and $18,726, respectively, much lower than comparable jobs in the private sector. Since the agency has lost its sense of purpose and mission--the protection of worker health--there is little to attract dedicated and well-qualified people. Routinely people who do choose to work for the agency use the opportunity to gain experience and then move on to other jobs.

There have been similar budget cuts and problems in other OSHA programs including safety and health standards development and education programs. The standards budget has been reduced from $7.4 million to $6.5 million, and the budget for worker education was reduced from $17 million to about $2 million. Currently, however, the agency has about one-third its professional positions in its health standards office vacant.

There have also been cuts in the budget for safety and health activities of other agencies including the National Institute for Occupational Safety and Health, the EPA Office of Toxic Substances, and the National Cancer Institute. The net result is a diminished role for the federal government and reduced activity in workplace protection efforts.

It is ironic that the decrease in the federal role in this area has come at a time when there are growing concerns and growing demands for action on safety and health matters. Concern is no longer limited to workers and employers in the traditional high hazard industries like construction and manufacturing. Workers in health care settings, office settings, and other service sector industries have serious concerns about safety and health problems like infectious diseases, VDT's, and carpal tunnel syndrome and are demanding action.

Indeed, polls and surveys conducted by unions and other organizations show that health and safety is one of the highest concerns of workers across many industries, and agreement that the government must do more to protect the safety and health of workers.

The OSHA program needs an infusion of new blood and energy. Additional resources are necessary to do the job that is required. But before any progress can be made, the agency must change its direction and make a clear commitment to worker protection. With such a commitment, serious recruiting efforts should bear fruit and allow the agency to fill the vacancies that now exist.

An honest and realistic assessment of required programs and resource needs must be conducted by OSHA and the Congress with public input, and the necessary funds appropriated to get the job done.

D. **Conclusion**

The Occupational Safety and Health Administration is failing to do its job to protect the safety and health of American workers. Eight years of the Reagan Administration's policies to weaken standards and enforcement and cut budget and staffing levels have left an empty shell of a program. Scores of serious and life-threatening hazards are unregulated, and no group of workers or industries is receiving the kind attention from the agency that is necessary or deserved.

The AFL-CIO believes major improvements in OSHA can be made and progress in worker protection achieved. Such improvements will only come, however, with a commitment by the next administration to an active and forward looking government role in worker protection efforts.

Even with administration reforms, the AFL-CIO believes it is time to consider legislation to update and improve the Occupational Safety and Health Act. Seventeen years have passed since the enactment of OSHA, and the law has never been amended,. Experience has shown deficiencies in the law where legislative changes could benefit worker protection.

Reforms are needed to expand protections to workers currently not covered, to expedite standard setting, and to require worker training and education. The Act's penalty structure and criminal provisions must be strengthened. Those provisions are badly out of date and fall short of those provided in more recent safety and health laws, such as the Mine Safety and Health Act and the Federal Emergency Planning and Community right-to-know act. Union and worker participation should be a cornerstone of all worksite safety and health programs. Safety and health committees should be mandated, with the right to inspect workplaces, shut down dangerous jobs and review employer hazard control measures.

There may not be total agreement on these OSHA reform measures. The AFL-CIO believes, however, that the time is right to start discussing possible areas for reforms and exploring ideas for improved protections.

These oversight hearings on OSHA are an important first step for laying the foundation for administration and legislative reforms. We look forward to the Committee's continued involvement in developing new initiatives for future improvements in worker safety and health protections.

Table I

OSHA HEALTH STANDARDS ISSUED SINCE 1971

	Standard	Date Final Standard Issued
1.	Asbestos	06/06/72
2.	Fourteen Carcinogens	01/29/74
3.	Vinyl Chloride	10/04/74
4.	Coke Oven Emission	10/04/74
5.	Benzene	02/10/78
6.	DBLP	03/17/78
7.	Arsenic	05/05/78
8.	Cotton Dust	06/23/78
9.	Acrylonitrile	10/03/78
10.	Lead	11/14/78
11.	Cancer Policy	01/22/80
12.	Access to Medical Records	05/23/80
13.	Hearing Conservation	01/16/81
14.	Hazard Communication	10/25/83
15.	Ethylene Oxide	06/22/84
16.	Asbestos	06/20/86
17.	Field Sanitation	05/01/87
18.	Benzene	09/03/87
19.	Formaldehyde	12/04/87

Table 2

OSHA SAFETY STANDARDS ISSUED SINCE 1971

	Standard	Date Final Standard Issued
1.	Miscellaneous Amendments for Construction	02/17/72
2.	Cranes/Derricks (Load Indicators)	07/14/72
3.	Roll-over Protection Structures (Construction)	04/05/72
4.	Miscellaneous Amendments for Construction	11/16/72
5.	Power Transmission and Distribution	11/23/72
6.	Scaffolding, Pump Jack Scaffolding and Roof Catch Platforms	12/02/72
7.	Lavatories for Industrial Employment	05/03/73
8.	Trucks, Cranes, Derricks, and Indoor General Storage	06/01/73
9.	Temporary Flooring--Skeleton Steel Construction	07/02/74
10.	Mechanical Power Presses ("no hands in dies")	12/03/74
11.	Telecommunications	03/26/75
12.	Roll-Over Protective Structures for Agricultural Tractors	04/25/75
13.	Industrial Slings	06/27/75
14.	Guarding of Farm Field Equipment, Farmstead Equipment, and Cotton Gins	03/09/76
15.	Ground-Fault Protection	12/21/76
16.	Commercial Diving Operations	07/21/77
17.	Servicing Multi-Piece Rim Wheels	01/29/80
18.	Fire Protection	09/21/80
19.	Guarding of Low-Pitched Roof Perimeters During the Performance of Built-Up Roofing Work	11/14/80
20.	Design Safety Standards for Electrical Standards	01/16/81
21	Latch-Open Devices (on Gasoline Pumps)	09/07/82
22.	Marine Terminals	07/05/83
23.	Servicing of Single-Piece and Multi-Piece Rim Wheels	02/03/84
24.	Electrical Safety in Construction	07/11/86
25.	Grain Handling Facilities	12/31/87
26.	Presence Sensing Device Initiation of Mechancial Power Presses	03/14/88

Table 3

OSHA FINAL HEALTH STANDARDS ACTIONS UNDER THE REAGAN ADMINISTRATION

STANDARD	DATE OF FINAL ACTION	HISTORY
Hazard Communication	11/25/83 8/19/87	In the 1970's, unions petitioned for right-to-know standard. In 1981, Carter Administration proposal was withdrawn by Reagan Administration. Responding to multiple right-to-know laws, OSHA proposed a new standard March 1982. In November 1983, final standard was issued which excluded non-manufacturing workers. In May 1985, and again in May 1987, Court ordered OSHA to expand standard to cover all workers. In August 1987, OSHA expanded the standard.
Ethylene Oxide	10/22/84	Health Research Group and union petitioned for emergency temporary standards (ETS) in August 1981. D.C. Circuit Court of Appeals issued order for standard to be set within a year. Final standard issued June 1984. Court ordered OSHA to expand standard to include a short-term exposure limit (STEL). In response to a court deadline, OSHA issued STEL in March 1988.
Asbestos	7/21/86	Unions petitioned OSHA for emergency standard in 1983. OSHA issued ETS which was overturned by the court. In April 1984, a permanent standard was proposed. Final standard was issued June 1986. In February 1988, court ordered OSHA to consider stricter protective measures for asbestos.

Field Sanitation	5/01/87	Fourteen years after a petition by United Farm Workers to provide sanitary facilities and clean drinking water in the field, OSHA acted under repeated court order. The rule was stalled by both Labor Secretary Brock and the OMB.
Benzene	9/03/87	In 1980, benezene standard overturned by the Supreme Court. In April 1983, unions filed petition for ETS and new standard. OSHA promised to set final standard by June 1984, but failed to act. In response to a law suit, OSHA promised final standard by February 1987. Final standard issued in September 1987.
Formaldehyde	12/4/87	In October 1981, unions petitioned for an emergency standard. Petition denied February 1982. After litigation OSHA set a timetable for action and commenced rulemaking. Court ordered OSHA to adhere to rulemaking schedule. Final standard issued December 1987. Litigation on final standard still pending.

TABLE 4

OSHA Schedule and Action on Major Health and Safety Standards *

HEALTH	1980	1981	1982	1983	1984	1985	1986	1987
Asbestos	P-10/09/75 under review	ANPR - 6/82	under review	F - 12/83	P - 6/10/84** F - 3/85	F - 11/85	F - 6/20/86**	
Ethylene Oxide (see note 1)		ANPR - 9/81	P - 6/83	P - 4/21/83** F - 9/84	F - 6/22/84			
Chromium	P - 11/80							P - 12/87
Cadmium	P - 9/80							
Nickel	under review							
MBOCA	P - 9/80							
Abrasive Blasting	P - 7/80							
Ethylene Dibromide			P - 5/83	P - 10/83	P - 10/07/83** F - 12/84	F - 11/85	F - 12/86	F - 2/88
SAFETY								
Tunneling	P - 8/80		under review 2/83	P - 8/05/83** F - 8/84	F - 7/85	F - 3/86	F - 4/87	F - 3/88
Trenching			under review 6/83	P - 10/83	P - 6/85	P - 12/85	P - 12/86 F - 6/88	P - 4/15/87** F - 7/88
Confined Space	P - 10/80			P - 9/84 F - 7/85	P - 6/85	P - 12/85 F - 12/86	P - 6/87 F - 8/88	P - 3/88 F - 3/89
Lock-out	ANPR 5/80			P - 9/84	P - 1/85	P - 12/85 F - 10/86	P - 1/87 F - 6/88	P - 10/87 F - 11/88
Grain Handling	under review *		P - 3/83		P - 1/06/84** F - 8/85	F - 12/85	F - 3/87	F - 10/87
Oil & Gas Well Drilling (see note 2)			under review 2/83	P - 10/83	P - 12/28/83** F - 8/85	2nd P - 1/86	2nd P - 5/87	2nd P - 7/88

* The indicated dates are taken from OSHA Regulatory Agenda's published in the Federal Register in June 1980, and October 1981 - 1987. The dates are the agency's estimated schedule for proposed and final standards.

** These are actual dates of proposed or final standards.

Note 1: The ethylene oxide proposed and final standards were issued under a court order which set a time limit for action by OSHA.

Note 2: As a result of intervention by the oil and gas well drilling and servicing industry and OMB, OSHA declined to issue a final standard, and instead has announced intentions to develop a second proposal.

Table 5

OSHA ENFORCEMENT

FISCAL YEAR 1980 - 1987

	FY 80	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86	FY 1987	% Change FY 1980-1987
Establishment Inspections	63,363	57,241	52,783	58,209	60,866	64,167	59,452	61,466	- 3
Records Inspections	--	--	8,442	10,368	9,195	7,136	4,619	2,395	--
Manufacturing Inspections	27,224	22,685	18,013	19,071	16,554	16,283	15,962	14,989	- 45
Construction Inspections	26,223	26,013	29,297	33,862	36,820	39,425	34,773	35,656	+ 35
No. Serious Violations	44,695	32,765	22,542	26,219	29,902	32,757	35,662	36,982	- 17
No. Willful Violations	1,238	622	113	151	205	281	322	529	- 57
No. Repeat Violations	3,541	2,255	1,253	1,536	1,954	2,669	3,238	3,505	- 1
Total Penalties ($)	25.5M	13.5	5.6	6.6	8.0	9.2	12.5	24.4	- 4

NOTE: Inspection activity fell off dramatically in FY 1981 and reached a low point in FY 1982. Also, since FY 1980, there has been a significant decline in inspections in the manufacturing sector. Inspection activity has shifted to construction. In construction, OSHA counts every subcontractor on a job as one inspection, and on the average OSHA gets eight "inspections" for every construction site visited. Manufacturing sites count only as one inspection. Thus, as there has been a shift in inspections to the construction industry, there has been an artifical increase in the total number of inspections conducted.

* Excludes records review inspections.

Source: OSHA Compliance Activity Reports and Inspection Reports, FY 1980 - FY 1987

Table 6

OSHA ENFORCEMENT — BY INDUSTRY *

FISCAL YEAR 1987

	Manufacturing	Construction	Agriculture	SIC 40-99	All Industries
Total Inspections	17,608	35,495	1,051	7,037	61,466
Records Inspections	2,163	3	0	228	2,395
Established Inspections	15,445	35,492	1,051	6,809	59,071
Safety Inspections	12,313	34,052	1,011	4,112	51,744
Health Inspections	5,295	1,443	40	2,925	9,722
Accident	413	628	46	341	1,458
Complaint	4,868	1,410	65	3,373	9,743
Follow-Up	2,005	608	24	335	2,973
Programmed Planned	8,258	24,391	874	1,125	34,804
Employees Covered by Inspections **	1.6 million	318,358	23,013	709,056	2.66 million
Violations:					
Willful	331	168	1	29	529
Repeat	1,240	2,023	26	201	3,505
Serious	16,316	16,109	60	3,339	36,982
Other	52,424	32,325	958	8,137	94,222
Violation Rate (per inspection):					
Willful	.002	.005	--	.004	
Repeat	.080	.057	.024	.029	
Serious	1.056	.454	.057	.490	
Other	3.394	.911	.911	1.19	
Penalties	$17.0 million	$6.5 million	$28,719	$844,678	$2.4 million

** Includes workers covered by records check inspections.

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* Source: OSHA Inspection Reports, Fiscal Year 1987

Table 7

INJURY AND ILLNESS INCIDENCE BY SECTOR, 1986*

	Total Cases	Lost Workday Cases
Private Sector:	5,629,000	2,590,300
Agriculture	90,300	44,900
Construction	647,100	293,100
Manufacturing	1,948,800	661,300
SIC 40-99:	2,885,400	1,358,900
Transporation Utilities	406,000	238,200
Wholesale and Retail Trade	1,431,600	621,500
Finance	115,400	50,600
Services	932,400	448,600

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*Source: Bureau of Labor Statistics, Annual Survey of Occupational Injuries and Illnesses, 1986

Table 8

FEDERAL OSHA BUDGET AND PERSONNEL*

Budget Fiscal Year 1977 - 1988

Fiscal Year	In Millions	
1988	$ 235,474	1/
1987	225,811	
1986	208,692	
1985	219,652	
1984	212,560	
1983	206,649	
1982	195,465	($242,608 was proposed by Carter)
1981	209,376	($211,900 was proposed by Carter)
1980	186,394	
1979	173,034	
1978	139,070	
1977	130,333	

Positions Fiscal Year 1980 - 1988

	1980	1981	1982	1983	1984	1985	1986	1987	(est.) 1988 1/
Full-time Equivalent Positions	3,015	3,009	2,354	2,355	2,355	2,176	2,092	2,141	2,352
Full-time Equivalent Employment	2,950	2,734	2,284	2,285	2,289	2,205	2,199	2,167	2,395

NOTE: Budget and personnel ceilings are taken from the President's Proposed Budget document. Budget figures for 1977-1988 are actual appropriations by Congress, not proposed levels.

1/ Budget and personnel were increased when the California State plan was turned back to Federal OSHA jurisdiction.

Table 9

COMPARISON OF OSHA AND MSHA BUDGET AND PERSONNEL

	FISCAL YEAR 1987	
	OSHA	MSHA
Number of Establishments Covered	4.5 million	10,979
Number of Workers Covered	65 million	320,000
Total Budget	$228 million	$156.5 million
Authorized Staff	2,141	2,750
Expenditures/Worker	$3.60	$489

Table 10

OSHA INSPECTION STAFFING LEVELS *

	FY 1980	FY 1987
Total OSHA Budget	$186.4 million	$228 million
Authorized Portions	3,015	2,131
Authorized Enforcement Personnel (including Supervisors)	1,700	1,200
On-Board Enforcement Personnel (including Supervisors)	1,400	1,050
Authorized Inspectors (Non-supervisory)	1,300	970
On-Board Inspectors (Non-supervisory)	1,125	850

* Budget figures and authorized positions are taken from the President's budget. The numbers of authorized and on-board enforcement personnel and inspectors are approximate numbers derived from OSHA Staffing Reports for September 1980 and September 1987.

The Chairman. Well, we want to thank you, Mr. Williams, for your testimony. I think what you testified to, as well as the other inclusions, are enormously valuable to the committee. You review in terms of the OSHA enforcement by industry; injury and illness incidence by sector; and then you review the budget and the personnel.

Also, you review the disparity between OSHA and MSHA in inspection staffing levels. And altogether, it is an enormously valuable document and supports, I think, a very distressing and disturbing testimony which you have given.

It must be a matter of very considerable concern to millions of workers.

As I understand, you are the chairman of the AFL-CIO Health and Safety Committee, is that right?

Mr. WILLIAMS. That is right.

The CHAIRMAN. And you have outlined in your testimony deficiencies in both the health and safety standards; and then you make some recommendations that might be reviewed by this Committee in terms of strengthening the legislation.

We certainly want to work with you as we look over those recommendations.

Your testimony demonstrates very clearly reductions in inspections, in establishment inspections, reduction in manufacturing inspections, reductions in the number of serious violations that have been found, reduction in the number of willful violations. And the total penalties are virtually the same in terms of dollar amount, which would indicate that with inflation, they have been significantly less.

One area where there has been some increases is in construction inspections, and we are going to have testimony later on that, because that is basically a ruse. And we will have some rather important testimony about how the agency was trying to step up the number of construction inspections, and how they went about doing that, which is a matter, I would think, that is enormously serious. It would almost appear as if OSHA is trying to mislead the Congress on that issue. But we will come back to that.

Let me just ask you a few questions. To what extent is the OMB involved in the decisions by OSHA, in terms of the development of health and safety regulations, that really affect the kind of protection that your workers and other workers are going to have?

Mr. WILLIAMS. Well, we think in very serious ways. The OMB has injected itself into the process, and interfered with OSHA's decisions. Now more recently OBM has used the paperwork law as a reason to interject its views, and to change the direction of OSHA, we think quite improperly and quite illegally. OSHA is required under the law to set these standards and perform its responsibilities, and the OMB is really preventing that.

That is why we finally took action in the unions, my union in particular, to go to court to have this clarified. We are confident that the court will agree with us that this has been quite improper on the part of the OMB, and is really preventing OSHA from carrying out its legal obligations.

The Chairman. Well, as we will see as we go into greater detail over the course of these hearings, the Office of Management and

Budget has had. a dramatically weakening impact in terms of the fashioning and the shaping of health and safety standards.

It is important for us to understand that there are many dedicated, committed professionals in that agency that want to do their job. But I think what we see now is where thoughtful and reliable and dependable recommendations are being made in terms of health and safety and they are being overruled in many, many instances, or watered down, by the Office of Management and Budget.

And they have two or three different cracks at those regulations. And do you know, for example, how many health personnel are over at OMB that deal with these issues?

Mr. WILLIAMS. I am not aware of there being any.

The CHAIRMAN. They don't have any. They don't have any. And we will look through OMB's role in fashioning health and safety standards because they are constantly watering them down, and putting the workers at risk. I think that is obviously intolerable.

You also cover OSHA's major weaknesses in terms of enforcement. I think your testimony points out the lack of resources, and the lack of personnel as well.

I don't know if there is anything else you wanted to add on that issue?

Mr. WILLIAMS. Well, certainly the fact that there are vacancies—I understand there are 122 vacancies in OSHA at this moment that have not been filled.

In terms of inspections there certainly has been a great weakening. There is a great inadequacy in terms of personnel, as the work environment becomes more and more dangerous and more and more difficult; we have an agency that simply does not have the resources to deal with it.

The budget has been very tight. We hear of circumstances where OSHA does not have the resources to act, for examples, on AIDS which poses a threat to health workers and so on, obviously is a very serious issue. When our people first approached OSHA about the need to do something about AIDS, one of the first responses was, well, what should OSHA not do if we do that? What do you want us to give up?

And that surely is not the kind of questions that should be asked. That is the kind of consideration that shouldn't be required.

Lord knows, we are doing little enough. We need to deal with the new crises, and the continuing ones as well.

The CHAIRMAN. Let me just ask a final question for now. There has been a serious failure in developing the health and safety standards, what does that mean to your workers and to workers in other manufacturing and construction sites?

What sort of message does OSHA send when health and safety standards have been late in developing, and when there are fewer inspections and fewer citations?

What does that mean to the people who are working in these plants and factories? Do they go to work every day and give some thought to what kind of conditions they may be working in?

Mr. WILLIAMS. Of course, it means the workers are at risk; it means that they are putting their health and, in a very real sense, their lives, on the line every day.

It certainly is true that in some instances, rather than face that every day, you cannot think about that every day, and there is an inclination to pretend that the hazard isn't there, or maybe it doesn't exist in the same way.

But that false confidence is shattered, then, time after time when something occurs, when a fellow worker takes ill, or when an accident—some of them have been very dramatic accidents—occurs.

We think, from the point of view of the AFL-CIO Safety and Health Committee, that the issue in terms of the future that we need to look at most carefully is some way of bringing much more active worker participation in to this process.

You know, we have discovered in America these last few years that workers have a great deal of understanding in what goes on at work, and can contribute greatly to productivity and efficiency and all the rest of it.

Workers have a great understanding about health and safety questions; and need to know more, in terms of occupational health hazards. And we need to examine some ways, it seems to us, and would propose this to the Committee, to give some consideration to ways in which as we move forward and improve the law, we make provision for the workers to be much more actively involved.

It is done in many other countries. The requirement of joint safety and health committees, for example, with some real authority on the job.

We never could really have enough inspectors to look at every situation and every circumstance, in every corner of the country. What we need are informed workers with the information and the training and the authority to take some direct action themselves in joint committees, and all the rest of it.

And we think that is a very important area for the Committee to look at.

The CHAIRMAN. One more, and then I will yield to the Senator from Illinois.

You mentioned in your testimony the confined space regulations and also the lockout regulations. Those issues have been before OSHA for many, many years, as I understand it.

Maybe you could best explain them, and then explain whether it is really complicated for OSHA to try and eliminate those particular hazards?

Mr. WILLIAMS. No, I don't think it is complicated.

The CHAIRMAN. Maybe you would start with the lockout issue.

Mr. WILLIAMS. Well, it is the whole issue of having access to electrical equipment and things like that, and locks, so that you cannot get at it accidentally, and there has to be a procedure to do it.

It is a matter of requiring that. And the old argument, of course, is always whether that isn't interfering with efficiency and all the rest of it. And there are some things that must be done in order to make sure that places are safe.

Confined space, again, has to do with enclosed spaces, making sure that the atmosphere is safe for workers to get in and do the work which must be done.

And these are the sorts of things——

The CHAIRMAN. That might have, what, dangerous fumes?

Mr. **Williams**. Well, of course, and lack of oxygen, and those kinds of hazards.

The **Chairman**. And certainly you and others have been willing to work with the agency in trying to shape up such regulations that would provide both protection and also not interfere with economic efficiency, as I understand it?

Mr. **Williams**. I would say, without fear of contradiction, that our union and the entire labor movement stands ready to help in every possible way.

The **Chairman**. Have people's lives been lost because they haven't gotten regulations in those areas?

Mr. **Williams**. Oh, of course. You are going to be hearing in detail about those kinds of circumstances.

The **Chairman**. I want to welcome Senator Simon to the hearing, and know how interested he has been in this issue.

Glad to have you.

Senator **Simon**. I thank you, Mr. Chairman. I thank you for holding the hearings, and I want to thank Lynn Williams for his leadership on this issue, as well as for his leadership in general.

I would like to insert an opening statement, and also note that an organization based in Chicago, the National Safe Workplace Institute, wants to submit testimony for the record.

It is headed by Joseph Kinney, who once was on Hubert Humphrey's staff here.

[The prepared statement of Mr. Kinney follows:]

Whither OSHA?

THE PREPARED STATEMENT OF THE
National Safe Workplace Institute

For the
OVERSIGHT HEARINGS ON THE
U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
April 18-20, 1988

Before the:
Committee on Labor and Human Resources
United States Senate
Hon. Edward M. Kennedy, Chairman
Hon. Orrin Hatch, Ranking Minority Member

Submitted by:
Joseph A. Kinney, Chairman
National Safe Workplace Institute
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Chicago, Illinois 60602
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I. WHITHER OSHA?

Mr. Chairman, members of the Committee, it is a privilege for me to present this statement on behalf of the National Safe Workplace Institute. The NSWI is a 501(c)3 not-for-profit organization headquartered in Chicago. The NSWI has one purpose, to advance safety and health in our workplaces. The NSWI, in order to pursue its mission with maximum independance, will not accept contributions from corporations or from labor unions.

The lives of the 104 million men and women who comprise the American workforce depend upon the outcome of this hearing.

This hearing is most timely. There will be a new Administration in 1989. We believe that workplace safety and health will be a high priority for the new administration, given the neglect that this issue has had in the 1980s. This hearing should be used by the 100th Congress to carefully and creatively evaluate the direction that the federal government, under the next administration, should take in the area of occupational safety and health regulation and enforcement. Honest and clear thinking is essential. The lives and welfare of the 104 million men and women who comprise our U.S. workforce depend on it.

1. *About the National Safe Workplace Institute...*

The National Safe Workplace Institute was formally established on May 28, 1987. The Institute was created only after the founders came to the conclusion that no existing organization offered true independence in the search for workplace safety and health. The NSWI employs a variety of techniques in pursuing the objective of safer workplaces.

The founders' interaction with the Occupational safety and Health Administration (OSHA), insurance and workers' compensation industries, and the civil and criminal justice systems made it clear to us that there is very little justice in the U.S. for those killed and injured in U.S. workplaces. We have a system that transfers much of the economic hardships stemming from workplace safety and health problems to the victims, their family members, and the public welfare system. The status quo is not only morally wrong but it serves to perpetuate workplace death and injury.

There is very little justice in the U.S. for those killed and injured in U.S. workplaces.

The Institute's techniques include moral suasion, research and education, intervention, litigation, and acknowledgement. During our brief life, we have worked on a wide range of workplace safety and health issues. Our work has led us to recognize that safety and health often are a low priority in many workplaces. Worse yet, we are shocked and disheartened that our government often makes decisions and judgments which do not favor the advancement of safety and health in our workplaces. These decisions and judgments are often rendered because the government lacks perfect information. This situation reminds us of the quote of Jose Ortega: "Life cannot wait until the sciences have explained the universe." Decisions that permit the continuation of the problems compound the problem. This resulting bias is killing people. Our bias, on the other hand, is to make judgments on the side of safety and health.

We can easily characterize the primary insights we have gained in terms of observations and assertions. Let us review what the Institute has learned.

2. *Observations and Assertions*

The status quo is not only morally wong but it serves to perpetuate workplace death and injury

1. The first observation is that there are significant cultural and psychological barriers to the way we, in the U.S., view workplace safety and health problem. Barriers include (1) death itself and (2) who dies and is injured. It is very difficult for human beings to confront the underlying reality of workplace death. We do not want to confront the causes of death, particularly when we realize that human errors contributed to death. We are reluctant to engage in ruthless examinations of causal

factors because we, as humans, wish to trust our employers and government in ensuring that our workplaces are safe and healthy.

Religion is especially helpful for those who do not wish to pursue intensive examinations of the causes of workplace safety shortcomings. For example, we attribute far too many deaths to fate as bestowed by God, rather than to the poor judgments of men. Second, the rich and powerful seldom die from trench cave-ins or scaffold collapses, from inhaling cyanide, or from accidents involving heavy machinery. The working class people who die and are injured do not often have a loud and clear voice in public affairs.

The National Safe Workplace Institute is shocked and disheartened that our government often makes decisions and judgments that do not favor the advancement of safety and health in our workplaces.

2. The second observation and assertion is that we will never make significant progress in workplace safety and health until we decide that it is a crime for people to expose others, especially people in their trust, to excessive risk. Civil penalties are necessarily limited in the impact such penalties have on human behavior. So, we must go beyond the rules, fines, and citations. Society, as a whole, should be angered at each and every workplace death and injury. The deaths and injuries of workers should not be accepted as something that 'is unfair but just happens in this life'.

There are significant cultural and psychological barriers to the way we view workplace safety and health problems.

3. The third observation is that we must view workplace safety and health problems from the standpoint of what causes problems in the first place. We have a legal system which rationalizes life-threatening behaviors and judgments. This is especially true for OSHA regulations. Anyone who has read dozens of OSHA citations is often at a loss for what really caused an incident which led to a death or an injury. Unless we can properly and accurately indentify causal factors, we obviously cannot construct regulatory regimes which will produce the safe and health workplaces promised our workers.

A wise person once said, you can't get the right answers unless you ask the right questions. While we have many questions, we believe that we have made a number of discoveries which are important to those who wish to see workplace safety and health progress in the U.S.

3. Research Results

The National Safe Workplace Institute has conducted three major inquiries since its establishment. These inquiries focused on three issues:

A. The utilization of criminal penalties in enforcing federal safety and health regulations.

B. The progress of the U.S. in reducing workplace safety fatalities and injuries.

C. Safety problems on federally funded public works projects.

We will never make significant progress in workplace safety and health untill we decide that it is a crime for people to expose others, especially people in their trust, to excessive risk.

The information produced by these inquiries clearly demonstrates that the federal government has failed, especially in the 1980s, to make workplace safety and health a high national priority. Indeed, we, as a nation, have fallen far short of attaining our goal of providing safe and healthy workplaces for our workers. Allow us to elaborate on our discoveries.

Criminal penalties. According to the statistics from the National Safety Council, over 135,000 men and women have died at work or from injuries sustained at work since 1970, the year that the Occupational Safety and Health Act was signed into law by President Nixon. The OSH Act provided for the imposition of criminal penalties, including imprisionment of up to six months, for employers who willfuly violate federal safety regulations. Despite these weak penalties, the federal government has yet to send a person to jail for OSHA violations. Indeed, there has only been two federal indictments since 1981, with one of those indictments coming after our report, **SAFETY AT BAY**, was released.

We have a legal system which rationalizes life-threatening behaviors and judgments.

Our federal policies do not criminalize workplace safety and health violations, even for those employers who are willful offenders. According to current policy, an employer must first have the death of a worker before an investigation may begin. That fatality must be the result of causes or behavior for which previous violations occurred yet were not cured by the employer. We have disclosed, by releasing a draft Department of Labor Inspector Generals report to the press, that OSHA enforcement personnel often do not see "willful" patterns because of inferior data management systems at OSHA. Even when OSHA identifies a potential criminal case, it takes two or more years for the federal government to obtain an indictment. OSHA, incidentally, is the only federal regulatory body that requires a death before it can initiate a criminal action.

Our study further revealed that the Department of Justice does not have adequate procedures for reviewing cases. The Department of Justice often spends two or more years researching potential cases before sending them to the U.S. Attorneys for prosecution. The system seems hopelessly biased in favor of employers, rendering one of the OSH Act tools largely impotent.

We, as a nation, have fallen far short of attaining our goal of providing safe and healthy workplaces for our wokers.

The Institute is cautiously optimistic that changes will occur. The Department of Justice has been responsive to our report. William F. Weld, the Assistant Attorney General in charge of the Justice Department's Criminal Division, wrote us that "The Criminal Division does share. . . concern about the adequacy of the penalties provided by statute for criminal violations of OSHA safety standards." Weld went on to say that the Criminal Division would use a new penalty structure permitting fines up to $500,000 for an organization and that the Division would be "happy to see a comparable increase in the period of imprisonment. . ."

Unfortunately, OSHA does not appear to share the Department of Justice's sense of outrage. Our report recommended that OSHA employ criminal investigators and send criminal cases directly to prosecutors. OSHA has ignored these policy recommendations. Indeed, OSHA Administrator John Pendergrass has informed us that OSHA does not even have a consistant policy for cooperating with local prosecutors who wish to seek criminal charges for deaths or conditions resulting from safety violations. Mr. Pendergrass has permitted, in certain situations, that the names of witnesses be removed from OSHA investigative files prior to those files going to prosecutors.

Safety progress. Our second report, THE RISING WAVE, revealed that the U.S. has not been able to sustain the rate of safety progress from the 1970s into this decade. We reported that 5,790 men and women, largely workers in high-risk jobs like construction or heavy manufacturing, died that might otherwise be alive. During the 1980s, OSHA personnel levels were cut by over one-third and OSHA became greatly diminished as an agency with both criminal and civil enforcement powers. OSHA-bashing was a popular Washington past-time. The combination of reduced personnel levels and OSHA's poor public image certainly has cost lives.

Despite these weak penalties, the federal government has yet to send a person to jail for violating OSHA regulations.

A combination of severe budget cuts and OSHA-bashing have sharply reduced OSHA's effectiveness. There is little that OSHA can do to respond to worker complaints and fears. Further, a series of legal decisions and personnel reductions have forced OSHA inspectors to spend more time on paperwork and less time on inspections and on enforcement actions. As a result, OSHA personnel have deployed what we call the "Minimum Worst Case" Syndrome. OSHA inspectors often will issue citations calling for meager fines rather than citations that will deter abusive and illegal behavior. OSHA inspectors simply do not have the internal resources that allow them to do their jobs in providing every man and women "a safe workplace" in our nation.

Even when OSHA identifies a potential criminal case, it takes two or more years for the federal government to obtain an indictment.

Who are these individuals who get killed at work? We believe those killed are disproportionately Black, Hispanic, or ethnic males 20-40 years old. These individuals do not have a loud voice in Washington. Very few are likely to be the sons or nephews of Members of Congress. To a large degree, they are Forgotten Americans, individuals who have found their lives to be expendable.

It is important to emphasize that our study examined individuals killed at work or those who died from injuries sustained at work. We did not review the nightmare of occupational disease which may kill up to 100,000 people each year. We did not attempt to address the tragedy of occupational disease because we wanted to focus on the high-risk groups that are the focus of OSHA's attention. However, we must come to realize that those who are killed by occupational disease should be as important to OSHA regulators as those who experience violent deaths. The problem of occupational disease is a ticking time bomb that will soon explode.

Federal project safety. Because we are a Chicago-based organization, we have given emphasis to regional problems. We have been especially interested in the Tunnel and Reservoir Project (TARP). TARP, known also as "Deep Tunnel", is the most expensive wastewater construction project ever financed by the federal government. TARP, which has won awards for engineering excellence, is a safety disaster. Ten lives have been lost and dozens of people have been injured on this project.

During the 1980s, OSHA personnel levels were cut by over one-third and OSHA became greatly diminished as an agency with both

TARP safety should be of interest to this Committee. TARP safety should be of interest because it illustrates what can happen when a federal agency is persuaded to work in a cooperative fashion with OSHA. Until the summer of 1987, no federal agency had ever taken action to penalize a contractor for failing to maintain safe and healthy worksites for its employees. The U.S. Environmental Protection Agency (EPA), thanks to the encouragement from Senator Quention Burdick, Chairman, Environment and [illegible]lic Works Committee, and the threat of litigation from us, took a number of steps that will ensure that TARP is a safer place to work. Specifically, Senator Burdick insisted in a letter that EPA do more to ensure safer working conditions, suggesting that oversight hearings and legislation could result without appropriate and prompt action. EPA Administrator Lee Thomas responded by ordering that each EPA region employ the services of a safety professional that would work to oversee safety on its projects.

In Region V, which covers the midwest and oversees TARP, EPA went even further. EPA, which finances 75% of wastewater construction costs, began an investigation that led to an unprecedented agreement between EPA and Kenny Construction Company of Wheeling, Illinois, which is under federal criminal indictment and which has been cited by OSHA for safety violations over 30 times. The agreement requires strict compliance with safety standards. If the agreement is breached, Kenny will be immediately suspended and barred from further contracting with EPA Incidentally, Gerry Kenny, recently boasted in a trade publication that his firm gains $100 million per year in public contracts.

OSHA does not appear to share the Department of Justice's sense of outrage... OSHA does not even have a consistent policy for cooperating with local prosecuters.

Region V, EPA also reached an unprecedented agreement with OSHA that will ensure coordination and cooperation between the two federal agencies when OSHA identifies safety violations. This agreement formalizes behavior that should have been routine since OSHA was created.

5,790 American men and women, largely employed in high-risk jobs, are dead who might otherwise be alive had the safety and health trends of the 1970s continued to the present day.

Unfortunately, Region V appears to be alone among EPA regions in its willingness to use the threat of contract suspension as a tool in the pursuit of safer worksites on its construction projects. This is true even though EPA is financing, through its wastewater construction programs, some of the most hazardous construction projects in the U.S.

It is shameful that federal agencies that finance construction or buy other goods and services seemingly care so little about how those goods and services were produced. It is especially shameful when one considers that the agency financing the construction, by ignoring safety and health problems, is by its actions weakening another federal agency, OSHA If contractors know that OSHA and the financing agency are communicating about safety problems and that contract suspension is a real possibility in the face of safety violations, then we will have taken a large step toward safer worksites on federal construction.

We must come to realize that those who are killed by occupational disease should be as important to OSHA regulators as those who experience violent deaths.

The shortcomings in cooperation between OSHA and other federal agencies must be addressed in the near future. It is very clear that the federal government will be playing a role in rebuilding the public works infrastructure of the U.S. If we take action soon to ensure cooperation and coordination between financing agencies and OSHA, we can have some confidence that this construction will be done with an eye toward safety and health.

4. *Victimizing the victim*

OSHA's poor record in targeting and enforcement is well known. OSHA has pursed a dichotimized enforcement strategy. If a case involves serious safety problems and a visible situation or well-known corporation, OSHA is more likely to issue a citation imposing severe fines. The most visible safety disaster in 1987 involved the Bridgeport building collapse which took 28 lives. The proposed OSHA fine for a group of contractors was $5.11 million dollars or $182,000 per person killed on this project. Our case experience indicates that the typical OSHA fine for a construction death, caused by serious safety violations, is less than $500. In America, justice is more likely to occur if the tragedy achieves media attention.

It is shameful that federal agencies that finance construction or that buy goods and services seemingly care so little about how those goods and services were produced.

The meager fines are only one part of the humiliating and unjust process that OSHA puts victims and their family members through. OSHA, in 1988, is an employers' agency, not an agency that exists for the benefit and wellbeing of the nation's workforce. It is especially not an agency for those individuals who are killed, injured, or who become sick. The process of imposing and enforcing the collection of penalties, with a few media-oriented exceptions, is an insult to victims and their family members. Let us trace the steps that OSHA goes through when it determines that a citation for safety violations is warranted.

First, OSHA will inspect working conditions and interview withnesses. When the evidence is gathered, OSHA will then meet with employers in a per-citation conference. A pre-citation conference is almost always available for an employers who requests such a meeting. After the conference, a citation may or may not be issued. The employer is given 15 days in which to contest the citation or to pay the fines. If the employer contests the citation and disagrees with OSHA, then the employer can appeal to a Department of Labor administrative law judge or to the U.S. Court of Appeals in Washington, D.C. The employer also can appeal an administrative law judge's decision to the Occupational Safety and Health Review Commission, an independent review body separate from OSHA.

OSHA has pursued a dichotimized enforcement strategy.

By comparison, victims— be they injured or sick workers and their family members— have essentially no rights. The only rights available are if the victim had a union affiliation and even those rights are meager and, as we have seen, often abused. The OSHA enforcement system we have in place, encourages backroom deals between the federal government and private businesses while those who have suffered are kept in the dark. OSHA will not provide access to citations or administrative review decisions to victims or their family members without these individuals filling out freedom-of-information requests. And, then, OSHA will often drag its feet. Court decisions have made it clear that OSHA must give first-come, first-served priority to freedom-of-information requests. Since little time is devoted to such requests in the first place, maddening delays are commonplace. Family members, for example, often do not receive citations involving a fatality until two or three months after a citation was issued. Those same family members might have to wait a year or more to learn the final outcome, assuming that the citation was not contested.

These comments should not be interpreted as critical of OSHA employees, who are, generally, very dedicated professionals trying

OSHA's defense against victim abuse is that OSHA exists to reduce unsafe working conditions. Furthermore, OSHA officials make it clear that they do not like working with victims or their family members because these individuals are often "emotional" or "irrational". To the extent that OSHA removes itself from those who are the victims of safety abuses, they remove themselves from justice. It is not surprising why OSHA has become an employers' agency and why victims are victimized.

5. The Ultimate Victimization: The Non-Victim

Since we began our work, we have come to grips with another phenomena, the Non-Victim Victim. This phenomena exists because OSHA has no obligation to investigate a worksite or a tragedy unless there is a fatality. We see this phenomena at work when a serious accident occurs. What this Committee needs to understand is that there are tremendous costs associated with the Non-Victim Victimization approach of OSHA.

The meager fines are only one part of the humiliating and unjust process that OSHA puts victims and their family members through.

There are dozens of cases we could use to outline the Non-Victim Victim approach. However, we will use the most recent one from our files, an accident that nearly took the life of Robert Goderis of Orlando, Florida. On November 20, 1987, Mr. Goderis was working as a carpenter on a construction project at the Orlando Airport when he fell off an improperly guarded seaffold. Mr. Goderis, 29 years old, fell over 20 feet, suffering severe head and neck injuries, and breaking both wrists.

Co-workers of Mr. Goderis phoned the OSHA office in Tampa to report the accident. Meanwhile, airport security police investigated the accident and took photographs revealing obvious scaffold erection violations. Later, from his hospital bed, Mr. Goderis phoned OSHA, which said that it had no record of the accident.

At that point, the National Safe Workplace Institute intervened, complaining to the OSHA area director in Tampa. The Institute sent information, including photographs, to OSHA, asking for an investigation. We also pointed out that it would be an infraction if the company failed to keep a record of the incident that nearly took Goderis' life.

Victims— whether they be injured or sick workers— have essentially no rights.

The response by OSHA to Goderis' employer, the Williams Company, is astonishing and demonstrates the OSHA's "Minimum Worst Case Syndrome" at work. The OSHA area director wrote the Williams Company, Mr. Goderis' employer, asking them "to investigate the alleged conditions and make any necessary corrections or modifications." The letter further asks the company to make the results of its investigations known to OSHA within 30 days. The letter warned that an OSHA investigation "may be conducted" if an appropriate response is not received.

The facts of this matter are appalling. Mr. Goderis could have been killed. His employer, on the other hand, is clearly getting a free ride. This is dangerous because Mr. Goderis' employers could easily repeat the same errors again. Next time, though, the result could be a fatality. Instead of having established a previous violation that could, if necessary, be used to support a Willful violation, OSHA has, in essence, dismissed this tragedy with a form letter. If you do not think this is a tragedy, think again. Mr. Goderis, who has a wife and two children, will probably never work as a carpenter again, due to the severe damage to his wrists. Mr. Goderis' wrists are as important to his as a medical license is to a doctor. A work tragedy has befallen a young man, yet OSHA cannot spend time to investigate and issue a citation, even with photographic evidence at its disposal. It is no wonder that the working men and women of this nation have lost confidence in OSHA.

OSHA officials make it clear that they do not like working with victims or their family members because these individuals are often "emotional" or "irrational".

6. Federal Pre-Emption

During the 1980s, the only hope that victims and their family members have had for justice has been local criminal authorities. In 1983, Richard Daley, the Cook County State's Attorney, filed criminal charges against three executives of Film Recovery, Inc., a company that used chemical processes to remove silver from photograph negatives. Daley's case arose from the death of 58-year old, Stefan Golub, who had died from inhaling cyanide from unlabeled vats. In Golub's death, OSHA issued a serious citation and assesed a $200 fine.

Daley's case arose from the death of 58-year old, Stefan Golub, who died from inhaling cyanide from unlabeled vats. In Golub's death, OSHA issued a serious citation a asessed a $200 fine.

Daley, working independently of OSHA, sought criminal homicide charges. The jury convicted the three defendants who were ordered to serve 25-year sentences. The imposition of sentencing, however, has been delayed pending an appeal on federal pre-emption grounds. The lead pre-emption case also involves Daley. The lead case is against the Chicago Magnet Wire Company. Indicments against Magnet Wire have been stayed pending appeal. The case is now before the Illinois Supreme Court and will likely go to the U.S. Supreme Court.

Our federal government, which has championed the rights of states, is silent when it comes to remedying a severe injustice like the death of Stefan Golub. Indeed, any impartial reading of the legislative history of the OSH Act makes it clear that the Act's proponents never intended that it would be used to shield an employer from criminal charges brought by a local prosecuter. Indeed, the OSH Act embodies the concept of voluntary compliance and provides for meager criminal remedies. The cost of delays caused by the Magnet Wire case must be measured in lives. We know of dozens of potential criminal cases that would be brought by prosecuters if this issue had been resolved in favor of states. Because these cases are not being brought, employers know that they only face justice from OSHA, which, as we have demonstrated, is not justice at all.

The American people will not tolerate the types of abuses that drove Richard Daley to seek prosecutions in the Film Recovery and Magnet Wire cases or Elizabeth Holzman in the Pymm Thermometer case in Brooklyn.

It is important for the 100th Congress to contemplate the implications of the federal pre-emption issue. It is clear to us that Daley felt persuaded to act because of the nature of OSHA and its inability to render meaningful justice. The federal OSHA needs the confidence of the American people, confidence that can be gained only through effective enforcement programs and policies.

II. Evaluating the Alternatives...

The United States clearly needs to systematically and creatively explore what role government should play in safety and health. We need to examine this role because there are two major changes that have taken place in the 18 years since the 91st Congress passed the OSH Act. These changes are: First, our workforce has undergone a dramatic evolution. There are substantially fewer workers in heavy industry and many more in service jobs. Second, the American people will not tolerate the types of abuses that drove Richard Daley to seek prosecutions in the Film Recovery and Magnet Wire cases or Elizabeth Holzman in the Pymm Thermometer case in Brooklyn. These cases, along with other economic and demographic factors have shaken the trust that the American pople have placed in the voluntary compliance philosophy of OSHA. The American people want a workplace safety and health regulatory agency that works to advance safety and health.

In November, Americans will elect a new President. We would like to see the new President, as one of his first acts in office, order the establishment of a President's Commission on Safety and Health in American Workplaces. This Commission should be composed of individuals who reflect the character of the nation. The Commission must not be dominated by so-called experts who have become adept at rationalizing and defending the status quo. Indeed, the Commission must be given a mandate to examine occupational safety and health issues from "Ground Zero" in an effort that will meet new realities without the shackles of the past. The Commission should seek the widest possible input and hold town hall-styled meetings across the United States. Indeed, we believe the way in which the Commission is appointed and the way in which the Commission approaches its work will be critical to its success and in the public having confidence in the Commission's work.

We would like to see the new President, as one of his first acts in office, to order the establishment of a President's Commission on Safety and Health in American Workplaces.

These comments appear to be critical of OSHA, which they are. These comments should not be interpreted as critical of OSHA employees, which are, generally, very dedicated professionals trying to do a job with very limited resources. OSHA has lost over one-third of its personnel and budget during the past seven years. Given OSHA's flawed mandate and scarce resources, one cannot reasonably expect OSHA professionals to be effective given the existing limitations.

In closing, we appreciate this most important and timely hearing, which we trust will provoke a more visible and meaningful debate on workplace safety and health issues. With healthy and open debate, our nation can come to terms with the programs and policies that we so desperately need in reaching the goals of the original OSH Act, a safe and healthy workplace for every American.

Our federal government, which has championed the rights of states, is silent when it comes to remedying severe injustices like the death of Stefan Golub.

We appreciate the opportunity to share these views with you.

Senator SIMON. One of the things that Joe Kinney has told me, I recall, is, he made comparisons of accident rates in industries in Japan and the United States, and it was striking. I hadn't seen it before, and I hope maybe we can get that inserted in the record.

[Information supplied follows:]

These are some of the statistics Joe Kinney uses in his information:

Every week day, 30 people die at work.

Our workplace fatality rate is much higher than the rate of many industrialized countries.

Our legal system has produced very uneven results in addressing negligence-caused workplace facilities and injuries.

Each year 100,000 Americans die from job-related diseases; as many as one-third of all cancers seem to be caused by occupational conditions.

The loss to the economy as a consequence of workplace deaths and injuries is a minimum of $17.6 billion dollars a year

Workplace deaths—7,500 per year; commercial airline deaths—120 per year; in 1985 there were 508 deaths related to cocaine use

This information came from the Japanese consulate in Chicago and the labor councillor of Japan from the embassy in Washington: the Japanese workplace death rate is less than 50% of our rate.

Senator SIMON. There is just no question we can do infinitely better than we are doing. And I have just been reading through your testimony here, getting some really solid stuff, although I had to look up the word "ergonomist." I have to tell you, I had to ask my staff what an ergonomist was. But I have learned from you in a variety of ways.

But you talk about a drop of 78 percent in citations; 36 percent in manufacturing inspections. And then I notice you use the phrase in your testimony, "union involvement" a lot, but in fact we have, what, 19 percent of the workers in this country protected with union protection? Is that roughly it?

Mr. WILLIAMS. Right. That is about accurate. We would like to change that figure substantially in the other direction.

Senator SIMON. I understand.

Mr. WILLIAMS. I am doing everything I can to bring that about.

Senator SIMON. I would love to see it change. But one of the reasons I would like to see it changed is, in reality, a lot of those inspections take place because a union complains and asks for an inspection; is that correct?

Mr. WILLIAMS. Yes, correct.

Senator SIMON. So you have all of these cases where there is no protection of any organized group for workers, and where inspections come few and far between.

Is that a reasonably safe assumption?

Mr. WILLIAMS. Yes, I think quite, Senator.

Senator SIMON. Then let me ask one other question. I have the impression that OSHA does a fair job of coming in when they inspect, and if there is a wheel turning on a machine where somebody's arm or leg might get caught, they will say cover the wheel, but when it comes to toxic substances or that kind of thing, that OSHA is basically pretty ill-equipped to protect workers.

Is that generalization accurate or not accurate?

Mr. WILLIAMS. Well, as Senator Kennedy said a few moments ago, there are certainly many committed and dedicated professionals working for OSHA and trying to do their best.

They work obviously within the restrictions and the difficulties that the entire agency faces in terms of budget and all the rest of it.

And we think there has been a great reluctance to really use NIOSH as it was intended, to really examine the chemical hazards as they ought to be examined.

There is a move now to try to move a lot of standards in terms of consensus standard setting, instead of using the NIOSH process, as we believe the law intends and requires, and should be done.

So it is true, OSHA is more effective in the on-site specific things that you can see need to be done, and then much less effective in terms of the general occupational health hazards from that point of view.

Obviously, the whole operation, however, in terms of number of inspectors, and number of inspections requested, and all the rest, is hopelessly inadequate in terms of the needs.

Senator SIMON. No question about it. I guess there are two. One is, you need the signal from the top: we really want to see that we are going to protect workers.

Mr. WILLIAMS. Absolutely. We need an Administration, as you have been suggesting vigorously across the land, that is active, and pro-active, in these kinds of considerations.

Senator SIMON. But the second thing you would also need is to have the people there who really are equipped to move in on these toxic substance kinds of things.

And I guess my impression is they are less equipped than they should be to move in that direction.

Mr. WILLIAMS. And as in many areas, as I have been emphasizing, the unused resource we have are the workers themselves.

My speculation would be, if one takes Japanese experience in other areas and moves it into this area—take Japanese experience in quality, for example, it is that they have involved the workers in the process very much. And that may indeed be the case here in terms of Mr. Kinney's figures.

I haven't seen those either, and I very much would like to, and I will.

Senator SIMON. Well, I thank you for your testimony. And I look forward to, as we go down the road, to any statutory suggestions we may make.

I do not think there is any question we can do a much better job for the people of this country that we are now doing.

Thank you, Mr. Chairman.

The Chairman. Thank you very much, Senator Simon. The statement will be included in its entirety in the record.

We have a statement from Senator Metzenbaum which will be included.

We also have a statement from Senator Weicker from Connecticut that will also be included.

[The prepared statements of Senators Metzenbaum and Weicker follow:]

U.S. Senator Howard M.
METZENBAUM
of Ohio

Committees:
Judiciary
Labor and Human Resources
Energy and Natural Resources
Select Committee on Intelligence

Chairmanships:
Subcommittee on Antitrust
Subcommittee on Labor
Subcommittee on Energy
Regulation and Conservation

Statement of Senator Howard M. Metzenbaum at Oversight Hearings of the Occupational Safety and Health Administration before the Committee on Labor and Human Resources

April 18, 1988

Nearly twenty years ago, Congress created the Occupational Safety and Health Administration, and directed the agency to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources". There is no more important responsibility in our government. I want to commend Chairman Kennedy for scheduling these OSHA oversight hearings.

Every year thousands of workers are killed on the job, and hundreds of thousands more are injured or become ill due to workplace hazards. We cannot hope to eliminate all workplace injuries, but we can set safety and health standards to prevent unnecessary workplace hazards. We cannot have a totally risk-free workplace, but we can enforce the law so that employers are required to abate health and safety hazards, or are punished for failing to do so.

Regrettably, in the last eight years, OSHA has not met its responsibility to protect the health and safety of American workers. During the Reagan Administration, OSHA has been a virtual non-entity. Where are the health and safety standards? The Office of Management and Budget now controls the process and has managed to bottle-up these standards for years. We waited 14 years for a field sanitation standard to guarantee farm workers access to drinking water and toilets. We waited seven years for an ethylene oxide standard. While OSHA and OMB have derailed the process, millions of workers have lost limbs, organs and lives.

Even standards that already are in effect are under assault from OSHA and OMB. OSHA has been dragged, kicking and screaming, into expanding its hazard communication standard to the non-manufacturing sector, and OMB has set up roadblocks at every turn. And now it seems that OMB may be attempting to gut the noise standard by attaching impossible conditions to OSHA's activities. We cannot allow these regulatory czars at OMB to turn back the clock on worker safety.

Where is the enforcement? OSHA has, of late, issued a number of celebrated fines for violations of recordkeeping requirements, but most of those fines are for paper violations, not for the real problem -- health and safety hazards in the workplace. Meanwhile, employers, with the tacit approval of the White House, have been allowed to intimidate OSHA into issuing minimal fines and looking the other way as safety and health hazards continue unabated year after year. We cannot allow this to continue. OSHA must stand firm when the health and safety of this nation's workers are at stake.

Over the course of these hearings, we will hear from labor officials, health experts and industry groups. We will also hear testimony from current OSHA employees who have not been able to do their jobs. In addition, we will hear from top OSHA officials who attempt to explain their actions, or rather, their inactions. Most importantly, we will see first-hand the terrible cost in human misery and suffering from workers and their families. There is nothing we can do to restore the limbs of the victims or to console the families who lost loved ones in workplace accidents. There is nothing we can do to bring back to life workers who have died from excessive exposure to benzene or carbon monoxide or asbestos. But what we can do, and what we must do, is to force OSHA to live up to its responsibilities so that today's workers will not become tomorrow's victims.

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Statement of
Senator Lowell Weicker, Jr.
OSHA Oversight Hearing
April 18, 1988

Good afternoon, I want to join my fellow members of the committee in welcoming the witnesses to this oversight hearing on the Occupational Health and Safety Administration (OSHA).

My remarks are brief but my concerns are many. Last year, in my state of Connecticut, we had the worst construction accident in the history of New England. That accident and the construction aspect of OSHA operations will be taken up much more fully at a subsequent hearing on the 26th of this month. I will have much more to say at that time.

Today's hearing is intended to provide an overview of how well OSHA is living up to the commitment we in the Congress made establishing it 18 years ago. I welcome the testimony of those gathered here today as an important tool the committee and the Congress can use to strengthen OSHA's ability to perform its mission.

The **CHAIRMAN**. We want to thank you very much, President Williams. And we want you to know that this is a continuing commitment of this Committee in oversight.

We are going to have these hearings now today and two additional days. But we want to have you know that we welcome what recommendations and observations you have, because it is a continuing process to review these agencies.

We want to be helpful, and we want to be constructive, but we also want to inform both the workers and the American people about whether OSHA is doing an effective job.

And clearly, we are falling short. We thank you very much for your testimony.

Mr. **WILLIAMS**. Thank you very much, Senator Kennedy, Senator Simon, for the opportunity to be here.

The **CHAIRMAN**. Our second panel of witnesses will be Mr. Frank Mirer of the United Auto Workers and Mr. Eric Frumin of the Amalgamated Clothing and Textile Workers. Mr. Frumin we understand you have some very special counsel with you today to help you get through this hearing. If he would like to come in we would be glad to have him.

Mr. **FRUMIN**. He will be here in a second.

The **CHAIRMAN**. Dr. Mirer, we will start with you.

STATEMENTS OF DR. FRANKLIN E. MIRER, DIRECTOR, HEALTH, AND SAFETY DEPARTMENT, INTERNATIONAL UNION, UAW, DETROIT MICHIGAN; AND ERIC FRUMIN, DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH, AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, NEW YORK, NY

Dr. **MIRER**. Thank you very much, Senator Kennedy. I would like to read some extracts from my testimony and hope that the full text could be entered into the record.

I am Dr. Frank Mirer, Director of the Health and Safety Department of the United Auto Workers. I am a toxicologist and certified industrial hygienist. I would like to say that the need for new health and safety standards for protection against chemical exposures and physical stresses on the job has never been more clear. We know more about the dangers now and how to protect against them than ever before. Support for improved protections is at a new high, and in some cases this pressure has softened management resistance. Nevertheless, the performance of OSHA under the Reagan Administration has been tragically deficient.

The UAW's experience with a safety standard for energy lockout and a health standard for formaldehyde, illustrate the general problems caused by administration inaction. I will start with the safety issue because there is no argument that there is a hazard there. Since 1973, 68 UAW members have been killed on the job because of management's failure to apply and maintain effective energy lockout programs. The UAW has acted to implement prevention programs against these fatality hazards. We negotiated for lockout programs. When no OSHA rulemaking was likely, the UAW chaired American National Standards Institute Committee, which adopted a consensus standard in 1982.

The collective bargaining and consensus activity proved to us that we needed more. We needed an enforceable OSHA standard. The UAW first petitioned for such a standard in 1979. Work began, then visible activity came to a halt in 1981. And in the last 7 years we have seen no visible activity. The critical step in this process is issuing a final proposal and holding hearings on a complete standard. OSHA has repeatedly promised action, then postponed these' action again and again.

The obstacles to getting chemical exposure standards passed are illustrated by the UAW's protracted battle to get a new standard for formaldehyde. Formaldehyde is a 5 billion pound-a-year chemical. It was first shown carcinogenic in laboratory tests in 1979. OSHA did not act after several years so the UAW petitioned for a new standard in 1981. When the petition was denied in 1982 we went to court, and after a dozen or more legal skirmishes, which we won, the standard was finally issued in November 1987. Now the battle, unfortunately, is not over yet. OMB has blocked the labeling and related hazard communication requirements of the standard. The UAW and several other unions have appealed for review because the exposure limits are not strict enough, and the medical surveillance and related requirements in this standard are inadequate.

These two specific examples reflect the general problem. Most chemical exposure limits were set before the OSHA law was passed and safety standards are largely a codified collection of 20 year old industry consensus standards. Instead of OSHA moving on its own to improve standards for protection against work place hazards. We, instead, have seen a series of extended court battles to gain any movement at all.

Now in the area of chemical hazards, new information about chemical hazards derived from recent studies of adverse health effects among workers and from laboratory tests of the widely used basic materials in industry show the urgent need to move forward. In my industry, metal working and transportation equipment, recent epidemiological studies, some in our plants, have shown excess mortality from cancers among workers exposed to machining fluids, foundry workers, model and pattern makers, electronics workers, plating and die-cast workers and certain welders. These groups were generally not exposed to chemicals above, the permissible exposure limit, and these were not exposures previously thought to be carcinogenic. The experience in this industry is reported all through the other manufacturing sectors.

Now, I want to emphasize that these findings should be considered a great public health opportunity. The diseases identified were already there, and now that the links between chemical exposure and diseases are emerging, we know that disease can be prevented by reducing or eliminating exposure. Exposure limits to many widely used chemical materials, therefore, must be reduced. In spite of this opportunity, seven years after the Reagan Administration took office, OSHA's standard setting record is bad and getting no better. Indeed, there are roll backs of protections, started in the early days of this Administration, which are still pending.

Now the problem is large, but can be solved. There are now several dozen widely used chemicals, including more than those I have listed above, for which the current OSHA standard should and could be quickly and sharply reduced. This is not an overwhelming number. Several groups of these chemicals could be regulated as classes. For these, we think OSHA should propose standards, hold hearings, evaluate the public record and promulgate the standard by the process defined in the OSHA law. Because many other chemicals also pose a hazard, work on generic health standards such as exposure monitoring standard, should be started. In addition to that, standards for medical surveillance, personal protective equipment, compliance plans and other issues should be considered.

Beyond chemicals, I would like to emphasize the problem of repeated trauma disorders, joint and nerve disease caused by repetitive motion and other physical stress. These conditions previously considered to be ordinary wear and tear, are now known to be the predictable and preventable results of physical stresses of jobs designed without people in mind. Recent experience also suggest that job redesign not only improves conditions, reduces disability, but also is likely to improve productivity and product quality. We think that OSHA should begin preparations for setting an enforceable standard requiring medical and workplace surveillance and prompt abatement of repeated trauma hazards.

The standard setting agenda I have laid out is feasible within the law and could be accomplished in a few years with a reasonable Government effort. But that effort has to be made.

As was said before, the OSHA record on setting new safety standards is even less productive than for health standards. The energy lockout problem I mentioned is only one of several obvious unmet needs in the manufacturing sector. Confined space entry is another example. Emerging hazards such as those of robots, and other advanced manufacturing systems are not now being addressed. Nowhere is the failure to issue and enforce strong safety standards more apparent than in the construction industry. To protect workers against safety hazards, OSHA must move immediately.

The CHAIRMAN. What are we talking about in the numbers there? You talk about those standards, maybe just for the benefit of the record, describe the process by which they were first developed. As I understand, once the agency was started, consensus standards were put in effect. Those were standards which had effectively been in use, is that right?

Dr. MIRER. Right. These were industry consensus standards that were adopted by OSHA.

The CHAIRMAN. And how many? Are we talking about five or ten or are we talking about 100s, 1000s?

Dr. MIRER. We are talking about hundreds of pages in the Federal Register containing safety standards.

The CHAIRMAN. Do these standards relate to some very dangerous hazards for workers?

Dr. MIRER. Right, very serious safety hazards.

The CHAIRMAN. And it was understood that those would be reviewed and that they would be upgraded on the basis of new scientific information, is that correct?

Dr. MIRER. That is correct. Yes.

The CHAIRMAN. And the point you are making here is over the period of the last 8 years, nothing has been done in that area, is that correct? Very little?

Dr. MIRER. Well in the health area, court action has forced some new standards out. In the safety area, I would say that virtually nothing has been done to upgrade safety standards in accordance to what we have learned since the OSHA law was passed.

The CHAIRMAN. Just a final point, and then I want you to continue your testimony. Your point is here that there is new scientific information and new safety information?

Dr. MIRER. That is correct.

The CHAIRMAN. It is compelling just because of its acceptability and its existence, but there has not been an effort by OSHA to reach out to try and use the best scientific or toxicological or safety data, is that correct?

Dr. MIRER. That is correct.

The CHAIRMAN. Thank you.

Dr. MIRER. Thank you, very much. The safety standards agenda is laid out in my full testimony, but certainly in manufacturing confined space entry and lockout would be the two leading ones.

The recent proposals for altering the standard setting procedure, I think, are diversions from the main problem. That is the suggestion for adopting the American Conference of Governmental Industrial Hygienists' TLV's wholesale. This is a blind alley, we think, which must not be substituted for real rulemaking. The labor movement is pleased that OSHA and some segments of industry have publicly recognized the need for wholesale revisions in the current chemical exposures standards.

The proposal, unfortunately, to adopt the TLV's would substitute the judgment of a self-appointed private group, heavily influenced by the chemical industry for the procedures and criteria set forth in the OSHA law. The ACGIH also by policy and past practice sets exposure limits to achieve less protection than the OSHA law requires. Most important, an effort to adopt ACGICH limits wholesale would be a scatter gun approach which will cover a great many chemicals of little interest without providing substantial or adequate protection against the highest-priority chemicals.

Just in summary, I think we have a great opportunity to protect health and safety of workers on the job through the setting of OSHA standards, taking advantage of our new knowledge. OSHA has to demonstrate that it intends to do it. OSHA must establish a set of priorities for rulemaking in health and safety. We think this should be done in consultation with the other actors in the field, labor, public health, scientific community and management. OMB must be stripped of its current de facto role as a super-regulatory agency. Adequate resources must be applied to standard setting. These include both personnel and the means to collect data needed for standards. Generic standards, as well as substance-specific health standards, are needed.

Finally, Congress must institute continuing effective oversight over OSHA performance in standard setting, must provide sufficient resources through the budget and appropriations process, and should consider specific legislative changes to provide more detailed direction to the agency in this area. Thank you very much.

The CHAIRMAN. Mr. Frumin.

[The prepared statement of Dr. Franklin E. Mirer, Ph.D. follows:]

Corrected Copy

April 18, 1988
Washington, D.C.

Testimony on

OCCUPATIONAL HEALTH AND SAFETY STANDARDS SETTING IN THE REAGAN ADMINISTRATION

By:

Franklin E. Mirer, Ph.D.
Director
Health and Safety Department
International Union, UAW

Before:

Labor and Human Resources Committee
U.S. Senate

In Behalf Of

International Union, United Automobile,
Aerospace and Agricultural Implement
Workers of America, UAW

I am Franklin E. Mirer, Director of the Health and Safety Department of the United Auto Workers. I am a toxicologist and certified industrial hygienist. I speak on behalf of 1 million UAW members in the United States, their families, and many millions of other workers who urgently need better standards for workplace conditions as an integral part of improved safety and health protections.

The need for new health and safety standards for protection against chemical exposures, physical stresses, infectious disease and safety hazards at work has never been more clear. We know more about dangers and how to protect against them than ever before. Support for improved protections is at a new high, and in some cases this pressure has softened management resistance. The performance of OSHA under the Reagan Administration has been tragically deficient.

1. The UAW's experience with a safety standard for energy lockout and a health standard for formaldehyde, illustrate the general problems caused by administration inaction.

The leading safety issue for the UAW is energy lockout. Since 1973, 68 UAW members have been killed on the job because of management's failure to apply and maintain effective programs for energy lockout during maintenance, repair and servicing of machinery and equipment. The UAW has acted to implement prevention programs against these fatality hazards, but our years long effort demonstrates the need for an enforceable OSHA standard on energy lockout.

The UAW has negotiated for lockout programs with employers and has jointly developed and delivered extensive training courses and programs for our members exposed to these hazards. These negotiations were more difficult without a standard.

The need for energy lockout and the outline of a solution is also generally recognized in American industry. When no OSHA rulemaking was likely, the UAW chaired an American National Standards Institute committee which adopted a consensus standard for lockout/tagout in 1982. The UAW believes this consensus standard needs revision before it can meet the requirements of the OSHA act or the needs for protection of workers, but it certainly is the basis for development of a proposed standard on which hearings should be held.

The collective bargaining and consensus activity proved to us that we need more, we need an enforceable OSHA standard.

The UAW first petitioned for a standard for lockout in 1979. Work began, OSHA held a series of public meetings to gather information and moved toward developing a standard which would have a profound effect across most of industry. All this visible activity came to a halt in 1981.

What has OSHA been doing about setting an energy lockout standard in last 7 years? The critical step in this process is issuing a final proposal and holding hearings on a complete standard. OSHA has repeatedly promised action, then postponed those actions again and again. Meanwhile, we have no standard, and the fatalities continue.

Traumatic injuries which safety standards are intended to prevent are a seriously undercounted source of pain, suffering, disability and cost. However, all estimates indicate that occupational disease caused by chemical exposures at work leads to many more deaths than on the job injuries.

The obstacles to getting chemical exposure standards passed are illustrated by the UAW's protracted battle to get a new standard for formaldehyde. As a result of more than 6 years of litigation by the UAW and other unions, OSHA was forced to issue a new standard for this chemical on November 20, 1987. The new rule reduced allowable exposures somewhat, but given the history of OSHA resistance, OMB interference and industry collusion on this matter, the standard was predictably deficient and the UAW was forced to go back to court.

Formaldehyde is a 5 billion pound a year chemical. The UAW launched an effort to get a new standard for this megaton chemical because we represent many workers in foundries, and foundries have the highest occupational exposures to formaldehyde among American workers. About 2 million workers in other industries, such as wood products, plastics, paper, textile and apparel industries also have significant exposures. Formaldehyde was first shown to pose a cancer hazard by laboratory tests in late 1979. OSHA did not act after several years, so the UAW, 14 other unions and the American Public Health Association petitioned for a new standard in 1981.

OSHA denied the petition in 1982, and the UAW went to court. After a dozen or more legal skirmishes, in which the UAW won a Freedom of Information Act suit including attorney fees, a District Court order to reconsider regulating formaldehyde, a further order requiring OSHA to develop a regulatory timetable, a Court of Appeals decision finding that OSHA had unreasonably delayed action and ordering OSHA to complete its evaluation and begin hearings, an order to issue a proposal, and an order to issue the standard after the hearings were over, the standard was finally issued.

The formaldehyde history included:

the threatened firing (stopped by a congressional hearing) of an OSHA scientist for concluding that formaldehyde posed a cancer hazard;

collusion between the National Cancer Institute and the Formaldehyde Institute culminating in a secret meeting in which the National Cancer Institute revealed the results of a major study to industry lawyers 5 months in advance of presenting the data to OSHA or the affected unions; and,

a last ditch effort by the Office of Management and Budget to hold up major parts of standard under the guise of "paperwork reduction."

The battle is not over yet. OMB has blocked the labeling and related hazard communication requirements of the standard, continuing its campaign to be a super-regulatory agency under the cover of the Paperwork Reduction Act. It is apparent that OMB, which has consistently opposed OSHA regulation of formaldehyde as a carcinogen, acted at the behest of the formaldehyde industry. The UAW, ACTWU, ILGWU, Carpenters and Paperworkers have appealed for review because the exposure limits are not strict enough, and because medical surveillance and related requirements are inadequate. And the Formaldehyde Institute is continuing its resistance as well.

Continuing review of the standard in preparation for Court of Appeals briefs confirms the comments of UAW President Owen Bieber on the day it was issued:

"The new OSHA standard for formaldehyde is a real but only partial victory in the battle for protection against this deadly chemical. OSHA has finally recognized the dangers of this powerful industrial chemical that is used in mega-ton quantities. Unfortunately, the new rule fails to provide many of the protections workers need against the cancer and respiratory disease which formaldehyde may cause, and instead gives a Labor Department stamp of approval to some inadequate exposure limits recommended years ago by the chemical industry. This regulation has the footprints of OMB and the fingerprints of the Formaldehyde Institute all over it."

2. Improved health and safety standards which could prevent injury and illness are urgently needed and are not being set.

The examples of energy lockout and formaldehyde reflect the general problem:

Most chemical exposure limits were set before the OSHA law was passed. Safety standards are largely a codified collection of 20-year old industry consensus standards.

Instead of OSHA moving on its own to improve standards for protection against workplace hazards, we instead have seen a series of extended court battles, in which unions first sue to get OSHA to start work, then sue to get the standard issues, then sue again bring the standard up to legal requirements. This is contrary to the intent of Congress in passing the OSHA law.

The health standards set in the 1970s, such as those for vinyl chloride, lead and cotton dust, have dramatically improved conditions in a variety of industries. Broad procedural requirements such as injury recordkeeping, Access to Medical and Exposure Records and Hazard Communication have shown the far reaching potential of generic rules. The enforcement of certain safety standards has demonstrated effectiveness in preventing injuries (although reliable injury statistics are difficult to find because of records falsification) The experience of the labor movement and public health agencies in passing and implementing these standards has shown both the policy and administrative actions needed to move forward and the benefits to be gained.

3. The need for improved health standards is supported by overwhelming scientific evidence which has accumulated since the OSHA law was passed.

New information about chemical hazards is derived from recent studies of adverse health effects among workers and from laboratory tests of the widely used basic materials of industry.

In the metalworking and transportation equipment industry, recent epidemiological studies, some in UAW plants, have shown excess mortality from cancer among workers exposed to machining fluids, foundry workers, model and patternmakers, electronics workers, plating and die-cast workers, and certain welders. These groups were generally not exposed to chemicals above the Permissible Exposure Limits or industry consensus standards like the Threshold Limit Values. Clinical studies have addressed respiratory, nervous system and other problems from exposures within accepted limits. Laboratory studies have identified previously unrecognized serious risks from glycol ethers, chlorinated solvents, petroleum solvents, silica, mineral fibers, certain plastics chemicals.

This is the experience in the auto industry, with large companies with active health and safety programs, good medical insurance, and a union which has aggressively pursued the issues. The problems are likely more pressing elsewhere.

The experience in this industry is repeated all through the manufacturing sector, in construction and service industries: the scientific evidence for chemical hazards, and the knowledge of prevention, is much more robust today than it was nearly 20 years ago when the OSHA law was being debated.

These findings should be considered a great public health opportunity. The diseases identified were already there; now that the link to chemical exposure is emerging, we know that the disease can be prevented by reducing—or eliminating exposure. The scientific evidence provides overwhelming support for the reduction of exposure limits to many widely used chemical materials.

In spite of this opportunity, seven years after the Reagan Administration took office, OSHA's standard setting record has been disgraceful. At first, the Administration attempted to roll back protections, and even took the industry side in lawsuits against the cotton dust and lead standards. The process of revising rules for Access to Medical and Exposure Records, the policy on methods of compliance and the Cancer Policy was set in motion. These rollbacks are still pending, even though Union petitions, congressional mandates, lawsuits and outright court orders forced OSHA to issue standards for hazard communication about toxic chemicals, ethylene oxide, asbestos, benzene, protection for hazardous waste workers, and field sanitation for farmworkers.

Even these few standards extracted from OSHA fell short of necessary protection. Unions appealed OSHA's inadequate rules on Hazard Communication, Ethylene Oxide and Asbestos to court. In each case, the courts sustained labor's claims that these standards were insufficiently protective, and remanded them to OSHA for additional consideration. In the case of Hazard Communication, a revised rule was promulgated only after two court orders and under threat of contempt. Now OMB and OSHA have stayed provisions of that standard and yet another legal actions was necessary.

Union petitions to OSHA for new health standards for protection against cadmium, methylene chloride, butadiene, wood dust, and the infectious disease hazards of AIDS and Hepatitis B in health care settings have not been acted on.

The problem is large but can be solved. There are tens of thousands of chemicals in use; for most chemicals data to fully evaluate health risks of long term exposure are inadequate, but for thousands there is good reason to be concerned. However, the actual size of the immediate task in rulemaking is smaller than these numbers suggest. There are now several dozen widely used chemicals (including those above) for which there is overwhelming scientific data which shows that the current OSHA standard is inadequate. This is not an overwhelming number, and several groups of these chemicals could be regulated as classes (for example, petroleum solvents, glycol ethers, isocyanates).

The best approach to the enormous worker health problem posed by present exposures to these materials is simply to follow the law. OSHA should propose standards, hold hearings, evaluate the public record and promulgate the standard by the process defined in the OSHA law.

That process is now so slow because OSHA spends excessive time before a proposal is issued. During the Reagan Administration, most of this delay was simply stalling to avoid action. The history of the formaldehyde standard illustrates this. In addition the agency wastes time conducting elaborate risk assessments which delay issuing a proposal. This work all has to be revised based on evidence compiled during the rulemaking hearing. Therefore, the pre-hearing period could be drastically shortened. For most chemical standards, the most hotly debated issues involve feasibility, cost and methods of exposure control. These matters are best evaluated in the context of a hearing.

In addition to accelerated action on substance specific standards, work on generic health standards, such as an exposure monitoring standard, should be started. A monitoring standard would require initial and periodic surveillance of exposure to all hazardous chemicals which were not covered by substance-specific standards. Additional generic standards for medical surveillance, personal protective equipment, compliance plans, any other issues, should be considered.

A standard for protection against infectious disease in health care settings is urgently needed for a section of the workforce previously neglected by OSHA. The need is given visibility by the AIDS epidemic, but scientific evidence shows that long overdue enforcement of recognized methods for protection against hepatitis B would eliminate the AIDS hazard from occupational exposure. The existing guidelines issued by the Centers for Disease Control (CDC) provide a basis for a standard, but are not by themselves a standard. Experience shows that voluntary compliance with these guidelines, or limited enforcement under the General Duty Clause will not be sufficient.

Repeated trauma disorders - joint and nerve disease caused by repetitive motion or other physical stress - exact a huge toll on American workers. These conditions, previously considered to be "ordinary wear and tear" are now known to be the predictable and preventable results of the physical stresses of jobs designed without people in mind. Recent experience also suggests that job redesign not only improves conditions, reduces disability, but also is likely to improve productivity and product quality. Despite this, it is often difficult to negotiate ergonomics programs. Employers have little guidance and minimal enforcement pressure to address ergonomic problems or to involve employees in solutions.

Currently, OSHA's only enforcement tool for ergonomic hazards is citation under the general duty clause. Surveillance requirements are only the general ones under the injury and illness recordkeeping guidelines, which are not directly aimed at diagnoses of repeated trauma disorders and depend almost entirely on worker reports of symptoms. OSHA should begin preparations for setting an enforceable standard requiring medical and workplace surveillance and prompt abatement of repeated trauma hazards.

Chemical exposure standards need to be tailored for application to construction operations. Exposures may be quite high, and the medical surveillance, exposure monitoring and other requirements of extended health standards may need some modification to fit the requirements of the construction sector. However, construction operations, as defined by the OSHA law, are also performed by workers employed in other sectors of the economy. Therefore, construction health standards should be examined for their impact beyond the traditional construction sector.

This standard setting agenda is feasible within the law and could be accomplished in a few years with a reasonable government effort. However, it requires first a change in the overall policy direction from one which seeks de-regulation to one which acknowledges hazards and aggressively seeks public health interventions to protect workers. The continuing policy role of the right wing ideologues who remain entrenched at the Office of Management and Budget is clear evidence of continuing resistance to such a public health program. The current leadership of OSHA has failed to advance a coherent program.

4. The OSHA record on setting new safety standards is even less productive than for health standards.

Most of the safety standards in place today are the same industry consensus standards that were codified in 1971 soon after the OSHAct was passed. These standards were supposed to serve as interim standards to provide some measure of protection while updated standards were being developed. Due to OSHA's failure to adequately address safety hazards little action has been taken.

The energy lockout problem is one of several obvious unmet needs for safety standards in the manufacturing sector. Confined space entry is another example. Unions have repeatedly petitioned OSHA to set standards on these hazards, but OSHA has failed to act. Petitions for emergency standards have been denied, and the agency's promises to issue new permanent standards have gone unfulfilled. Indeed, standards promised by

1984 have yet to be proposed. Thus as of today failed even to schedule a hearing. Emerging hazards, such as those of robots and other advanced manufacturing systems, are not being addressed either.

Similarly, starting in 1980, OSHA promised to issue a grain safety standard to prevent explosions in grain elevators. OMB interference delayed a proposed standard for 3 years insisting that there be no limitations on dust accumulations in grain elevators. When that standard was finally issued in December 1987, it was seriously watered down by OMB interference. Strict dust control requirements apply only in part of a grain elevator, housekeeping requirements are vague and may not be enforceable, and grain and flour mills are exempt from any particular dust accumulation limit.

Within the last month, OSHA drastically revised its standard for protection of workers against the hazards of mechanical power presses. OSHA's new rule permits the use of electronic presence sensing devices to activate the press cycle. This action, which is contrary to the safety principles used in industry at large, was taken over the objections of not only unions, but the National Safety Council as well.

Nowhere is the failure to issue and enforce strong safety standards more apparent than in the construction industry.

Thousands of workers are killed each year in accidents involving the collapse of scaffolds, trench cave-ins, electrical hazards and other dangers. In these areas, too, OSHA has promised action, but to date no new standards have been issued (other than a minor revision of electrical standards for construction).

On those few safety hazards where some action has been taken, there are disturbing signs that standards will not be tough enough to protect workers. Bowing to pressures from the Office of Management and Budget, OSHA is moving to issue standards that are "performance oriented" which give employers great flexibility in deciding how to comply with regulations. Indeed, even in cases where unions and employers unanimously agreed that stronger specific standards were needed, OSHA has bowed to OMB pressure. Unfortunately in many cases these performance standards lead to inadequate protections or no protections at all leaving workers at risk. Similarly, in the name of "paperwork reduction" OMB is attempting to force OSHA to eliminate the provisions of standards that certify that training or inspection has taken place. Thus there will be no records to document employers actions to satisfy key health and safety requirements.

To protect workers from safety hazards, OSHA must move immediately to issue standards for energy lockout, confined space entry, trenching, scaffolding and concrete forms. Further delays to protect workers against these hazards are unacceptable.

Interference by the Office of Management and Budget in the safety standards process must stop. OMB interference will result in further delays and weakened standards, and lead to more injuries and deaths on the job.

5. Recent proposals for altering the standard setting procedure are diversions from the main problem.

There are two diversionary proposals being advanced by as ways to avoid activating the standards process. Suggestions for adopting the American Conference of Governmental Industrial Hygienists' (ACGIH) Threshold Limit Values (TLV's) wholesale, and for negotiated rulemaking, are blind alleys which must not be substituted for real rulemaking.

The notion behind these proposals is that consensus mechanisms without a public hearing with full consideration of available evidence will produce protective standards more quickly and with less controversy than OSHA's mandated notice and comment rulemaking procedures. The labor movement believes that the contrary is true. This is proved by the safety standards process, which involves extensive labor management discussions, but which has produced little. The movement of consensus standards to OSHA enforceable standards has also been virtually non-existent. Critics often attack OSHA rulemaking hearings as time consuming, confrontational and expensive. However, the full blown rulemaking process has produced protective, effective, feasible health standards.

The proposal to adopt the American Conference of Governmental Industrial Hygienists Threshold Limit Values (TLV's) wholesale is a diversion from the main needs in occupational health standard setting. Such action would substitute the judgment of a self-appointed, private group, heavily influenced by the chemical industry, for the procedures and criteria set forth in the OSHA law. In 1970, Congress mandated NIOSH as the source of recommendations for health standards - not ACGIH. The ACGIH also by policy, sets exposure limits to achieve less protection than the OSHA law requires, and meets in private without public input and scrutiny. Most important, an effort to adopt ACGIH limits would be a scatter gun approach which will cover a great many chemicals of little interest without providing substantial or adequate protection against the highest priority chemicals.

Negotiated rulemaking is unlikely to provide a useful alternative to the mandated procedure. Unions participated in such efforts regarding benzene and methylene dianiline when OSHA refused to do anything else. Negotiations are touted as a means to reduce the effort and controversy of a rulemaking hearing. However, experience shows them to be slow, uncertain and a large drain on personnel resources, and negotiated rulemaking potentially can restrict workers rights in standard setting.

SUMMARY AND RECOMMENDATIONS

We have a great opportunity to protect the health and safety of workers on the job through the setting of new OSHA standards. For the last 7 years there has been a concerted effort by the Reagan Administration to resist setting new standards. Public campaigns, court orders and Congressional action have pressed OSHA to set some new standards, but progress is terribly slow in the face of such resistance.

The critical needs in this area are:

1. OSHA must demonstrate that it believes that new and additional standards are needed. This has not been the case up to now.

2. OSHA must establish a set of priorities for rulemaking in health and in safety. This should be done in consultation with labor, the public health and scientific community and management.

3. OMB must be stripped of its current de facto role as a super regulatory agency. This would be an indication that policy has shifted in favor of worker's health.

4. Adequate resources must be applied to standard setting. These include both personnel and the means to collect data needed to support standards.

5. Generic standards as well as substance specific health standards are needed.

6. Congress must institute continuing effective oversight over OSHA performance in standard setting, must provide sufficient resources through the budget and appropriations process, and should consider specific legislative changes to provide more detailed direction to the agency.

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Mr. **Frumin**. Mr. Chairman, my name is Eric Frumin. I am the Director of Occupational Safety and Health for the Amalgamated Clothing and Textile Workers Union. On behalf of President Jack Sheinkman, Secretary-Treasurer Charles Sallee and the 260,000 members of ACTWU, I want to think the Chairman and members of this committee for their interest in the health and safety of workers on the job. My testimony today covers the enforcement of OSHA standards.

On July 21, 1981, Assistant Secretary of Labor Thorne G. Auchter held a meeting with all the agency's Regional Administrators in Colorado Springs. Along with Deputy Assistant Secretary and former CIA Attorney Mark Cowan, he presented his field managers a package of proposed changes in OSHA enforcement policy. Combined with his plans for sharp cuts in OSHA's budget, these changes would ultimately devastate the agency's effectiveness in the workplace. Some of the major features of this new policy were; (1) the exemption of millions of workers in thousands of workplaces from routine safety inspections, based on the employers injury records; (2) the restriction on the ability of inspectors to respond to valid complaints from workers and others about workplace hazards; (3) the elimination of the requirement for worker representatives during OSHA inspections to receive what is called walk-around-pay; (4) the redefinition of willful, serious and repeated violations, which made it very difficult for the front-line inspectors to find such violations or issue meaningful citations; (5) follow-up inspections were virtually eliminated; (6) the surveying of employers following inspections to seek complaints concerning the behavior of front-line inspectors, and (7) the requirement that citations with penalties amounting to more than $10,000 be reviewed by the national office.

At the time of the Colorado Springs meeting, the Nation was seeing the first evidence of a positive turnaround in the basic measures of job safety. According to the Bureau of Labor Statistics, the rising rates of injuries in the late 1970's had finally stopped in 1979. We saw substantial declines in 1980 and 1981. However, the new policies and the drastic personnel cuts which accompanied them began to take hold. By 1983 the previous decline in injury rates had leveled off, and 1984 saw a 12 percent jump in injury rates; the largest year-to-year increase in OSHA's entire history. Conditions have not improved since then. The overall rates of injuries have remained largely unchanged since 1984, and in some industries, have actually increased. Furthermore, the severity of lost workday injuries, has increased steadily since 1983, and is now at the second highest level in OSHA's history; nearly 64 days of lost work-time for each 100 full-time workers.

Thus, it is obvious that OSHA's enforcement programs are not preventing the continuous toll that workplace violence takes on the lives and health of American workers. This failure was not the result of some befuddled negligence by unimaginative agency bureaucrats. In 1980, President Reagan promised corporate America a deliberate campaign to destroy OSHA's effectiveness in the workplace and Mr. Auchter delivered on that promise. In my prepared statement I offer the committee a brief review of the major aspects of OSHA's dismantling of its enforcement program. However, in reviewing these problems, it is necessary to appreciate the importance of OSHA's propaganda efforts in recent years.

There plainly has been a change at OSHA. Two years ago in the spring of 1986, OSHA was increasingly a target of public scorn for its enforcement failures. The grass-roots political movements supporting the right-to-know, and the homicide convictions of top executives at the file Film Recovery Systems Corporation in June 1985, clearly demonstrated the lethal risk to workers, and the legal risks to employers, of OSHA's hands-off policies. It was increasingly obvious to journalists and other observers that OSHA was creating problems by both its inaction and its image of inaction. On August 11, 1985, there was a gas leak at the Union Carbide Plant in Institute, West Virginia. This was a sister plant to the one in Bhopal, India, and had been extensively inspected by OSHA earlier in 1985, following the Bhopal tragedy. The hospitalization of 145 people vividly exposed the weakness of both the chemical industry's safety management and OSHA's enforcement programs.

Secretary Brock was thus forced to act vigorously to rehabilitate OSHA's image. On April Fool's Day, 1986, Secretary Brock announced, with much fanfare, that OSHA was citing Union Carbide for $1.3 million in penalties for recordkeeping violations. What he failed to mention was that for five years, OSHA had been giving employers like Union Carbide, a major incentive to falsify injury records. That is, a guaranteed exemption from routine shop-floor inspections. The several recordkeeping citations which OSHA has issued since have received considerable attention in the mass media, as was Secretary Brock's goal. However, there are only 15 cases in which OSHA effectively penalized an employer more than $1,000 for each unrecorded injury. Furthermore, no employers have been criminally prosecuted for their intentional violation of recordkeeping requirements.

Finally, for those cases in which OSHA has achieved a settlement of the company's appeal, not including the IBP case, OSHA has foregone $3,007,000 in penalties, or nearly three-fifths of the $5,012,000 originally proposed. With this hearing, we acknowledge that OSHA is making feeble attempts to repair its image, but must again ask Mr. Pendergrass, what have you done to force employers to repair workplace hazards? When will you repair OSHA's broker enforcement machine?

An exemption policy tied to recordkeeping inspections was a bad idea, as Assistant Secretary Pendergrass apparently just discovered on March 22, 1988. Last month, Mr. Pendergrass told reporters that the Film Recovery case, "has been in everybody's mind. It is something we do not want to happen again." As expected, he denied that this change had anything to do with his forthcoming appearance before this committee.

But just over a year ago, Mr. Pendergrass did not feel this way. On March 19, 1987, I pointed out the same deficiencies in OSHA's enforcement policy to Congressman Lantos and the House Government Operations Committee. In response to this criticism, Congressman Konnyu, Republican of California, and Lantos, engaged in the following exchange with Mr. Pendergrass.

> Mr. KONNYU. Mr. Secretary [sic], Mr. Frumin . . . said . . . that your inspector, . . . after he reviews the paperwork, if that company is below aver-

> age . . . , he doesn't have the right on that basis to go into that shop floor and check things out . . . Is that a true representation of OSHA policy?
>
> Mr. PENDERGRASS. I think . . . [i]n fact, I know he is mistaken.
>
> (Mr. Pendergrass continued) If the compliance officer feels that further investigation is warranted, it is his responsibility to go back to his supervisor and say, "I think this deserves more attention."
>
> Mr. LANTOS. Your own instruction state that if the calculated rate is below the BLS average rate, a comprehensive safety inspection normally shall not be conducted.
>
> Mr. PENDERGRASS. Normally . . . this places [the] responsibility on the compliance officer to make a . . . professional decision, and I don't really have any problem with that.

Well the committee was not impressed with Mr. Pendergrass' excuses. On March 22, 1988, the same day as announced his partial change in OSHA's recordkeeping-exemptions policy, the committee unanimously approved its report which stated:

> The decision to inspect a plant may have life or death consequences for the workers. OSHA should go into a plant, do an inspection, and then decide whether or not the plant is safe . . . . While injury records may be used to target companies for an inspection, they should not be used to exempt them.

The horrendous impact of OSHA's negligence has also been vividly documented by the Labor Department's own Inspector General, who reported in 1987 that based on OSHA's own case files, it had found over 20 employers with significant histories of multiple fatalities. One particular electrical contractor, OIG stated, had 19 fatalities from 1975 to 1984. However, according to OIG, OSHA had failed to:

> Identify or target for inspections, those employers with significant numbers of workplace fatalities . . . and to use its nationwide fatality inspection data in citing and penalizing employers with repeat violations.

OSHA has failed to act on OIG's findings and many cases of known fatalities go uninvestigated by OSHA's regional and area offices and State plan agencies. In addition, as indicated on page 24 and 25 of my prepared statement, OSHA has failed or refused to investigate the massive coverup of fatalities by employers. For instance, recent studies by NIOSH and several State health departments have indicated the following rates of unreported fatalities: New Jersey, 117 total deaths, unreported 33 deaths; Colorado, 155 total deaths, unreported 54 deaths; Tennessee 73 total deaths, unreported 27 deaths; North Carolina, 105 total deaths, 35 unreported deaths; Kentucky, 57 total deaths, 16 unreported. For a total of 507 deaths of which 165, or 33 percent, were not reported to OSHA.

The CHAIRMAN. What is the basis of your figures? How did you devise these figures?

Mr. FRUMIN. What NIOSH and the State health departments did was to look at the death certificates that are filed with State health departments by either county coroners, medical examiners or whoever. They determined, based upon the information, on the information on the death certificate, whether the worker died "at work" or not. And then they looked further to see in what industries those workers worked, and determined whether or not they were in industries covered by OSHA. So they came up with a list of deaths that were either known or virtually certain to be in industries under OSHA's jurisdiction. For instance, in the three States studied by NIOSH, Kentucky, Tennessee, and North Carolina, only construction workers were included, etcetera. So they knew that these were workers who worked for companies covered by OSHA. Then they got from OSHA, under the Freedom of Information Act, the list of deaths that OSHA knew about, and simply compared the two.

I say simply, but it was not that easy because OSHA fails to collect needed information about fatalities. But, in any event, they were able to make a comparison and they found on a national basis a consistent 33 percent under-reporting, non-reporting of fatalities by employers to OSHA.

The Chairman. Well why? Why would they deliberately misrepresent or under-report the numbers of deaths? Why is that in their interest?

Mr. Frumin. Well, there is a major incentive for employers not to report a fatality because if OSHA does not find out about it from any other source, the employer never gets investigated. When OSHA does do investigations of fatalities, they potentially can take serious action, including of course, criminal prosecutions. In fact, OSHA fails to undertake criminal prosecution, but it is a very serious situation for an employer.

The Chairman. Is that a new situation, or is it more prevalent now than it has been in the past?

Mr. Frumin. These studies were only done since 1981, so we really do not have a comparison we can make before that time. But, at least 10 percent, or not it is a horrendous number.

The Chairman. Well whatever, it is a completely unacceptable process.

Mr. Frumin. It is, it is absolutely unacceptable.

Senator Simon. If my colleague would yield. What penalty does any company have for not reporting?

Mr. Frumin. Well, the OSHA Act says that you are subject to the most severe sanctions under the Act: a $10,000 fine and six months in jail for making a false report to OSHA. I would argue that that means you can prosecute them for not reporting. But I will let the lawyers worry about that. I would say they should be prosecuted criminally. They can certainly be fined for failing to report. It is assumed that employers know fatal injuries have to be reported and OSHA has, in the rare case, cited an employer for failing to report when it finds out about the report from some other source only.

Senator Simon. But as we review the law, and possible changes, this may be an area where we ought to clarify it and make it absolutely clear that a company has to report.

Mr. Frumin. The Act is extremely weak on serious injuries and enforcement of actions following serious injuries, but particularly on fatalities. If we compare it, say to MSHA, we see that there are major differences. We need something in the OSHA Act which says when a worker dies, everything stops until that gets investigated. We need to look at them as potentially criminal situations so that there is evidence preserved so the workplace stops, so witnesses can be interviewed and so forth. Frankly, I think employers would do more to prevent injuries if they knew that everything had to stop if someone got killed, than from all the other sanctions. Particularly in high risk industries like the construction industry. They would be reporting to OSHA so fast that we would not believe it if they knew they had to stop the workers until it was investigated.

Senator **Simon**. Thank you.

Mr. **Frumin**. What has been OSHA's response to these facts? When the New Jersey Health Department notified OSHA's New York City Regional Office earlier this year of the names of the employers whose workers had been killed without reporting them to OSHA, the OSHA Regional Office initially refused to take any enforcement action. Indeed, when queried by the Newark Star-Ledger, an OSHA official simply claimed that "if we don't conduct an investigation because we have not been informed by the employer, we should not be faulted."

We are confident, Mr. Chairman, that you and the other members of this committee, recognize the hypocrisy in OSHA's recent action. They will not bring back Stefan Golub who was murdered by cyanide poisoning at the Film Recovery Company, nor restore health to the hundreds of thousands of sick and injured workers, whose employers felt free to ignore job safety laws during the last seven years. The Reagan Administration has never cared much for the hard work of job safety enforcement. The changes Mr. Pendergrass has implemented will not repair OSHA, will not hire inspectors desperately needed to detect work place hazards in factories, hospitals, or construction sites across the country. They will not redefine safety violations to make full use of OSHA's existing penalty authority. That sort of repair requires more than a few headlines. It takes an administration which believes what the Congress meant when you said that all workers are entitled to a "safe and healthful workplace."

Given the record of this administration, we find no such commitment now, nor do we expect it to materialize before November. We may see a few more headlines about large OSHA fines, but we will also see headlines about dead and injured workers. We would much prefer safe and healthy workers and fewer phony headlines. We know now that even with the doubling of OSHA's enforcement staff, which is urgently needed, it is no longer enough to place the entire burden of enforcement on the representatives of the Secretary of Labor. On the contrary, the time has come to provide the workers themselves, and their designated representatives, with the legal authority to directly challenge the improper safety practices of corporate management. This would include mandatory worker health and safety committees, with the right to investigate complaints, shut down dangerous jobs and review employer safety information and data.

This will obviously require amendment of the OSHA Act. On the other hand, in doing so, we will be adopting a structure already largely enforced in the American mining industry. We will also be joining with many other western industrial democracies, including Canada, Britain, Australia, France and the Scandinavian countries. There are nations which in many respects have bettered our record on occupational safety and health, and which now provide that protection to workers. I respectfully urge the committee to seriously consider the possibility of allowing workers to move from the mere "Right-to-Know" to an effective "Power-to-Act." The experience of the past 18 years has demonstrated to the trade union movement that we as a Nation have no real alternative. Thank you very much.

[The prepared statement of Mr. Frumin, with an attachment, follows:]

TESTIMONY OF

ERIC FRUMIN

DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH
AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO

ON

OSHA ENFORCEMENT UNDER THE REAGAN ADMINISTRATION

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITES STATES SENATE

WASHINGTON, D. C.
April 19, 1988

Mr. Chairman, my name is Eric Frumin. I am the Director of Occupational Safety and Health for the Amalgamated Clothing and Textile Workers Union, AFL-CIO. In addition, I serve as Chairman of the Labor Research Advisory Committee on Occupational Safety and Health Statistics to the U. S. Department of Labor.

On behalf of President Jack Sheinkman, Secretary-Treasurer Charles Sallee and the 260,000 members of ACTWU, I want to thank the Chairman and members of this Committee for their interest in the health and safety of workers on the job. My testimony today covers the issue of the enforcement of OSHA standards.

I. INTRODUCTION

On July 21, 1981, Assistant Secretary of Labor Thorne G. Auchter held a meeting with all the agency's Regional Administrators in Colorado Springs. The first few months of Mr. Auchter's stewardship had not been as kind to him as it had to some of his fellow political appointees in the new Administration. He had been publicy embarrassed by his having ordered the destruction of educational materials published during the Carter Administration and his bungled attempt to fire a leading OSHA cancer specialist. Worse, the Supreme Court only a month before had flatly rejected his efforts to destroy the cotton dust standard through the ruse of so-called "cost-benefit analysis".

However, Mr. Auchter appeared in Colorado Springs, along with Deputy Assistant Secretary and ex-CIA attorney Mark Cowan, with a package of proposed changes in OSHA enforcement policy.

Combined with his plans for sharp cuts in OSHA's budget, Auchter's changes in enforcement policy would ultimately devastate the agency's effectiveness in the workplace.

Some of the major features of this new policy were:

-- The exemption of millions of workers in thousands of workplaces from routine, "general-schedule" safety inspections, based on the employers' recorded Lost Workday Injury rates. The change was artfully given the misnomer of a "targetting" policy.

-- The restriction on the ability of inspectors to respond to valid complaints from workers and others about workplace hazards.

-- The redefinition of "serious", "willful" and "repeated" violations which made it almost impossible for the front-line inspectors to find such violations or issue meaningful citations.

-- Follow-up inspections were virtually eliminated.

-- The surveying of employers following inspections to seek complaints concerning the behavior of front-line inspectors.

-- The requirement that citations with penalties amounting to more that $10,000 be reviewed by the National Office, thus practically ensuring that the field staff involved would come to the attention of political appointees committed to preventing such penalties.

At the time of Colorado Springs meeting, the Nation was seeing the first evidence of a positive turnaround in the basic measures of job safety. According to the Brueau of Labor Satistics, the rising rates of injuries in the late 1970's -- an obvious legacy the years of neglect under the Nixon and Ford Administrations -- had finally stopped in 1979.

(As the BLS itself has admitted, there are many problems with the reliability of these rates, which are based on employers' own records. We do not accept them as the most accurate indicators of the actual toll of worker injuries and deaths on the job. On the contrary, as has been documented in the past few years, they severely undercount the true number -- perhaps by as much as two or three times. Much of this cover-up is due, without question, to the rewards and incentives offered to employers by both OSHA and the state worker compensation systems for falsification of injury records and reports. Nonetheless, they are the only available national estimates on the rates of injuries and illnesses on the job.)

We saw substantial declines in 1980 and 1981.(See Chart 1) However, the new policies, and the drastic personnel cuts which accompanied them, began to take hold. Employers got the message that OSHA was "backing off". By 1983, the previous decline in injury rates had leveled off, and 1984 saw a 12% jump in injury rates, the largest year-to-year increase in OSHA's entire history.

Conditions have not improved since then. The overall rates of injuries have remained largely unchanged since 1984, and they have actually increased in a few major industries. Furthermore, the severity of lost workday injuries, as measured by the amount of time required away from work, has increased steadily since 1983, and is now at the second highest level in OSHA's history, -- nearly 64 days of lost work-time for each 100 full-time workers.(See Table 1)

Thus, despite the rhetoric which flows freely from the pens of OSHA's publicists, OSHA's enforcement programs are not preventing the continuous toll that workplace violence takes on the lives and health of American workers. This failure was not the result of some befuddled negligence by unimaginative agency bureaucrats. Rather, it was the product of a deliberate campaign to destroy OSHA's effectiveness in the workplace, at the job site, on the shop floor. President Reagan promised such a campaign to corporate America when he sought their support in 1980, and Mr. Auchter delivered on that promise.

What follows is a brief review of the major aspects of OSHA's dismantling of its enforcement programs. The primary methods used by the Reagan Administration to undermine job safety enforcement since 1981 have been:

-- Exemptions of major industrial sectors.

-- Restriction on investigation of worker complaints.

-- Improper settlements of both employers' informal objections to and formal appeals of citations.

-- The choking of agency efforts through the reductions in agency staff and the use of restrictive citation policies.

-- Improper approval and monitoring of inadequate state plans.

These are covered in more detail below. However, before reviewing them, it is necessary to appreciate the importance of OSHA's propaganda efforts in recent years. There plainly has been a change at OSHA in the past two years. In the spring of 1986, OSHA was increasingly a target of public scorn for its enforcement failures. The grass-roots political movement supporting Right-to-Know was becoming quite successful in demonstrating the vacuum OSHA's withdrawal had created. The December, 1984 gas leak in Bhopal left many American citizens worrying whether they could be killed or maimed as had thousands of their counterparts in India.

By 1986, Stefan Golub, a 61-year old Polish immigrant in Chicago, was not able to worry about the risks of chemical exposure. On November 24, 1982 an OSHA compliance officer did a front-office, "record-review" inspection and determined that the injury records of Golub's employer showed a "below-average" injury rate. As ordered by Assistant Secretary Auchter, the inspector left, never observing the conditions which threatened Golub and the primarily minority, immigrant and unorganized workers in the plant. On February 10, 1983, only 2 1/2 months later, Golub died from acute cyanide poisoning under conditions which, in the words of a Cook County judge were "totally unsafe... [the plant manager] saw people vomiting."

The homicide convictions of top executives at the Film Recovery Systems Corp. plant in June 1985 clearly demonstrated the lethal risks to workers -- and the legal risks to employers -- of OSHA's hands-off policies. It was increasingly obvious to journalists and other observers that OSHA was creating problems by both its inaction and its image of inaction. This was not the image which the Republican party needed as it looked forward to the 1986 Congressional elections.

On Aug. 11, 1985, there was a gas leak at another Union Carbide plant, in Institute, W. Va. This was a sister plant to the one in Bhopal, and had been extensively inspected by OSHA earlier that year following the Bhopal tragedy. The hospitalization of 145 people vividly exposed the weakness of both the chemical industry's safety management and OSHA's enforcement programs.

Secretary Brock was thus forced to act vigorously to rehabilitate OSHA's image. What OSHA found at Union Carbide was a company whose arrogance regarding chemical hazards and worker safety was so bold that the Administration could single out Union Carbide.

In effect, OSHA could use Union Carbide to make itself look good.

Thus, on April Fool's Day, 1986, Secretary Brock announced with much fanfare that OSHA was citing Union Carbide for $1.3 million in penalties for violations of recordkeeping requirements. What he failed to publicize was that OSHA had been restricting its compliance officers from taking strong action against negligent employers for the past 5 years. His press release made no mention that since 1981, OSHA had given employees like Union Carbide a major incentive to falsify injury records - a guaranteed exemption from routine shop-floor inspections.

The several recordkeeping citations which OSHA has issued since have received considerable attention in the mass media, as was Secretary Brock's goal. However, there are only 15 cases in which OSHA effectively penalized an employer more than $1,000 for each unrecorded injury, over the past two years (see Table 2). Furthermore, no employers have been criminally prosecuted for their intentional violation of recordkeeping requirements.

However, one of these employers, the IBP corporation, was cited only after an extraordinary investigation by the House Government Operations Committee of both that company and OSHA's investigation of it. At one point, the Committee entertained the possibility of seeking perjury charges against the IBP's Chairman regarding his fallacious denial of falsifying injury records.

Most of these citations have been in manufacturing. Rarely have such investigations been conducted in other high-hazard industries, such as construction, transportation or selected service industries. Moreover, the companies receiving such penalties are primarily giants in the chemical or transporation equipment industries, to which a penalty of less that $1 million dollars is barely noticeable in the "bottom line".

Moreover, for those cases in which OSHA has achieved a settlement of the company's appeal (not including the extraordinary IBP case), OSHA has forgone $3,007,000 in penalties, or nearly three-fifths of the $5,012,400 originally included in the penalties. In many of these cases, the companies succeeded in forcing OSHA to agree to settlements which covered large numbers of workers in other workplaces, once again exempting the employers from the penalties they deserved for corporate-wide negligence in recordkeeping. Such penalties would have mounted to many times more than the few hundred thousand dollars which Chrysler, General Motors or Scott Paper eventually paid.

With this hearing, we acknowledge that OSHA is making feeble attempts to repair its image, but must again ask Mr, Pendergrass, "What have you done to force employers to repair workplace hazards?" We also want to know, "When will you repair OSHA's broken enforcement machine?"

An exemption policy tied to recordkeeping inspections was a bad idea, as Assistant Secretary Pendergrass has apparently just discovered on March 22, 1988.. It yielded little or no actual improvement in workplace safety. It never should have been initiated, and was halted only after workers like Stefan Golub died. Last month, Mr. Pendergrass told reporters that the Film Recovery case "has been in everybody's mind. It's something we don't want to happen again." As expected, he denied that this change had anything to do with his appearance before this committee.

But just over a year ago, Mr. Pendergrass did not apparently feel this way. On March 19, 1987, I pointed out the same deficiencies in OSHA's enforcement policy to Congressman Lantos and the House Government Operations Subcommittee on Employment and Housing. In response to this criticism, Congressmen Konnyu (R.- Cal.) and Lantos engaged in the following exchange with Mr. Pendergrass:

> Mr. KONNYU: Mr. Secretary [sic], Mr. Frumin ... said ... that your inspector, ... after he reviews the paperwork, if that company is below average ... , he doesn't have the right on that basis to go into that shop floor and check things out.... It that a true representation of OSHA policy?
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> MR. PENDERGRASS: I think ... [i]n fact, I know he is mistaken.
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> The compliance officer is expected to review the data that is before him and and make a decision ... as to whether or not further investigation is warranted.
>
> If the compliance officer feels that further investigation is warranted, it is his responsibility to go back to his supervisor and "I think this deserves more attention."... We have to depend on the integrity and professional competence of our compliance officers.
>
> * * *
>
> MR. LANTOS: Your own instruction state that if the calculated rate is below the BLS average rate, a comprehensive safety inspection normally shall not be conducted.
>
> MR. PENDERGRASS: Normally....this places [the] responsibility on the compliance officer to make a ... professional decision, and I don't really have any problem with that.

The Committee was not impressed with his defense of his policies. On Masrch 22, 1988, the same day as he announced the change in OSHA's recordkeeping-exemptions policy, the Committee unanimously approved its report on this issue. In no uncertain terms, the Committee stated:

> OSHA's policy of exempting companies ... has allowed employers through underreporting of injuries to avoid OSHA inspections of thier plants. OSHA's exemption policy appears to be creating an incentive for employers to cheat by understating occupational injuries on their logs....
>
> The decision to inspect a plant may have life or death consequences for the workers. OSHA should go into a plant, do an inspection, and then decide whether or not the plant is safe.... While injury records may be used to target companies for an inspection, they should not be used to exempt them.

We are confident, Mr. Chairman, that you and the other members of the Committee recognize the hypocrisy in OSHA's recent actions. Mr. Pendergrass' expressions of contrition will not bring back Stefan Golub, nor restore health to the hundreds of thousands of sick and injured workers whose employers felt free to ignore job safety laws during the last 7 years.

Reagan Administration has never cared much for the hard work of job safety enforcement. The announced changes will not repair OSHA, will not hire inspectors desparately needed to detect workplace hazards in factories, hospitals, and on construction sites across the country. They will not redefine safety violations to make full use of OSHA's existing penalty authority, nor help rank-and-file workers -- and especially the millions of unorganized workers -- close the many loopholes in the Hazard Communication and other standards. They will not end the exemptions for employers who request "consultation" inspections, nor force states to take strong action in similar cases.

That sort of repair requires more than a few headlines. It takes an administration which believes what the Congress meant when it said that all workers are entitled to a "safe and healthful workplace". Given the record of this Administration, even to this day, we find no such commitment now, nor do we expect it to materialize before November. We may see a few more headlines about large OSHA fines, but we will also see headlines about dead and injured workers. We would much prefer safe workers who live out the work day to see their families, workers who live to enjoy a retirement free from job-related disease and disability, and fewer phony headlines.

* * *

As indicated above on p.2, the Reagan Administration set out in 1981 to effectively dismantle the enforcement of OSHA standards. OSHA's opponents had sought and failed to do the same in 1980 with Senator Schwecker's infamous "OSHA Improvement Act," which was soundly rejected by this Committee. Judging from the intensity of that opposition, they correctly reasoned that they could achieve even more through administrative fiat than they could through legislative compromise, and it was this purpose which Secretary Donovan and Mr. Auchter set out to accomplish in the summer of 1981. They used several consistent means to do so.

II. EXEMPTIONS POLICY

As described above, the new exemption policy for manufacturing industries, based on employers' injury records, was launched in October 1981. Employers qualified in either of two ways. First, the lists of plants "targeted" for routine safety inspections which OSHA's National Office distributed to Area Offices omitted entire industries with industry-wide injury rated below the national average. This maneuver thus omitted huge numbers of workers in such dangerous industries as chemical and automobile manufacturing, petroleum refining, textiles, and others. Not surprisingly, many of the recent large-scale citations for willful recordkeeping violations have been in these industries. These deliberate cover-ups were detected only because OSHA was obliged to begin its Chemical Emphasis Program at Union Carbide after the Bhopal tragedy, or as a result of worker complaints or fatalities (e.g. Chrysler, Doe Run, etc).

One result of this perverse targeting policy is that OSHA has virtually ignored the millions of workers in industries outside of manufacturing and construction. In 1987, OSHA initiated only 1,125 inspections in the service, transportation and public utility industries.(See Table 3) These covered only 700,000 workers, or only 10% of the total seven million workers in the health care field. Even professional window-washers are effectively exempted! While some of this failure is due to the severe staff cutbacks of the Auchter-Pendergrass era, OSHA's neglect of these sectors is nonetheless conscious and deliberate.

If employers were not already exempted from routine safety inspections under OSHA's misnamed "targeting" policy, they got a second opportunity if inspectors actually arrived at the plant gate. Mr. Auchter's infamous "record review" exemptions provided yet another restraint on the hands of front-live compliance officers. OSHA inspectors were compelled by this horrendous policy to perform 41,073 front-office, recordkeeping inspections during the period 1982 - 1987, out of a total of ____ all OSHA-initiated health and safety inspections. (This would not include inspections begun as a result of action by outside parties, such as complaints, fatalities, referrals, etc.)

Worse, the record review inspections which OSHA inspectors conducted in 1986 were 40% of the 11,591 OSHA-initiated safety inspections in manufacturing plants. On these 4,308 occasions, OSHA inspectors actually traveled to factory sites, presented their credentials, held an opening conference with an employer, and spent time reviewing injury records in the office. The average amount of time spent on these inspections was 7 hours. No shop-floor conditions were observed, and no workers interviewed about the hazards of their jobs.

Recordkeeping enforcement for occupational disease

OSHA's failure to viforously enforce the recordkeeping requirements for occupational injuries is paralleled by its failure to enforce the requirements to record occupational diseases. While many of these diseases are difficult to identify as specifically work-related, some are still quite obvious, and OSHA's failure to require their recognition must be seen as part and parcel of the employers' original cover-up.

For instance, on November 25, 1985, four workers at the CAnton, Ohio foundry owned by Winters Industries (a subsidiary of the Whittaker Corp.) were forced to go to a local hospital because of the severe visual disorders they suffered as a result of their overexposure to a chemical called DMEA (dimethylethylamine), which is used in the coreroom. They had previously suffered such symptoms in September, 1984, and had requested a NIOSH Health Hazard Evaluation (HHE) in August, 1985. That HHE began, over the company's objections, on September 19, and was adjourned until December 18, 1985. Following both an OSHA complaint inspection in September, 1984, and the initial NIOSH visit in September, 1985, the two agencies wrote to the company informing it of the occurrence of these symptoms among its workers, and the likelihood that the symptoms were due to overexposure to DMEA. In addition, the Material Safety Data Sheet from the company's supplier stated that DMEA "can cause ... blurred vision and a sensation of seeing halos around lights."

On December 27, following NIOSH's return to the plant (which involved negotiations with Winters regarding the terms of a warrant), twelve workers again reported to the hospital with the same symptoms of blurred vision, as well as dizziness, nausea and headaches. The company also provided chemical splash goggles to the coreroom workers following the NIOSH visit in December.

Two months later, OSHA determined during an inspection that the company had failed to record on its log of injuries and illnesses these 15 cases of poisoning. The Cleveland Area Office issued an "other" citation (i.e. not "willful") against Winters Industries on May 23, 1986 for violations of the recordkeeping requirements. Winters contested the citation.

The company's contest was still pending when the final NIOSH HHE report was issued in September, 1986. This report stated:

> Over 90% of coreroom employees reported experiencing at least one symptom or health effect consistent with exposure to DMEA. Most graphic among these reported symptoms was the halovision phenomena, ... but other vision disturbances ... were also prominently reported by the employees.
>
> ... coreroom workers were exposed to airborne DMEA ... at levels sufficient to cause ... acute episodes of halovision during the workshift. These reported vision effects ... are compatible with the long and repititious history of high DMEA levels....

Notwithstanding all of the above, OSHA agreed on November 14, 1986, to withdraw the citation. The Molders Union objected to the OSHA's action. On December 24, 1986, Associate Regional Solicitor William S. Kloepfer responded that the citation was withdrawn "because of weaknesses in the case" which OSHA "feared ... might adversely affect the enforcement of its recordkeeping regulations." Interestingly, he also stated that "the matter was reviewed at the National Office, Regional and local levels of both OSHA and the Solicitor's Office."

Given OSHA's susceptibility to political pressure, and the vigorous legal representation with which the company attempted to block the NIOSH investigation, one is compelled to ask OSHA: "Why did this case need such detailed attention? Who exactly reviewed it at the National Office? Who made the decision to drop the citation?"

A similar case of OSHA malfeasance regarding illness recordkeeping arose at the Champion International paper plant in Frenchtown, Montana. On July 10, 1986, in response to a complaint from Paperworkers Union Local # 885, the OSHA Area Office in Billings, Mont. issued a citation against the company for 91 willful recordkeeping violations, including 62 cases of hearing loss which were not recorded on the log. Noise is a major hazard in the paper industry, and many of the workers were undergoing annual audiometric exams required by the OSHA Hearing Conservation Standard. Despite the fact that this was over three months following the citation against Union Carbide, the penalty for this 91-item willful violation was only $9,000.

As expected, the company contested. Again, the Solicitor's Office was instructed to withdraw the citation. When the Paperworkers complained, they were told that OSHA was afraid to proceed because it feared it would lose its case on appeal and this would hamper its recordkeeping enforcement elsewhere. However, unlike the Winters case, the Solicitor specifically stated that the vagueness of the Department's own Recordkeeping Guidelines was a major part of the problem.

However, there was nothing inadvertent in OSHA's predicament. OSHA and BLS staff had specifically proposed in 1983 that OSHA remedy this problem by incorporating specific guidance to employers on the recordability of hearing loss cases in the newly-revised official Guidelines. That proposal was obstructed by OSHA's Policy Director Anthony Goldin, another ex-CIA attorney.

Both OSHA and BLS have received numerous recommendations from professional and even industry groups to incorporate specific guidance on recordkeeping for hearing loss -- an essential follow-up to the regular audiometric surveillance undergone by literally millions of workers yearly under the Hearing Conservation Standard. To date, OSHA appears no closer to closing that particularly gaping loophole in its recrodkeeping requirements than it was when Mr. Goldin created the lophole in 1983.

Exemptions based on consultation inspections

Another vehicle for exemptions has been OSHA's abuse of its authority to offer "consultative" assistance to employer. In 198_, Mr. Auchter initiated a policy of exempting employers from inspections for one year if they request OSHA to conduct a "consultation" inspection. During such inspections, no citations are issued for violations. Also they are carried out confidentially -- worker representatives do not participate, and the results are withheld by OSHA from workers.

While the impact of this type of exemption is harder to measure than that of the record-review exemption, the policy clearly violates the intent of the Act that employer programs be kept completely separate from, and only supplement, essential enforcement operations.

III. COMPLAINTS

One of the pillars in the Act's enforcement scheme is Section 8(f) guaranteeing workers and their representatives the right to an inspection in response to a complaint. In the late 1970's, OSHA first began to take seriously its obligations to investigate complaints. As a result, the number of complaints rose dramatically from an average of 7,400 in 1973-1976 to 19,300 1977-1980 (See Table 4). Part of this increase was undoubtedly due to OSHA's willingness to financially support the training of workers about the Act's requirements and workers' rights and roles in the enforcement process. In view of the relative small number of inspectors which OSHA had even at that time, it was entirely appropriate for OSHA to seek the assistance of workers themselves in identifying possible violations of the Act.

Under Mr. Auchter, OSHA discouraged workers from filing complaints, and the numbers dropped accordingly: down to 6,700 annually in 1982-1984 (See Table #4). One means of doing this was to limit the scope of inspections to only those items indicated on the complaint. Thus, if an employer received a "consultation" exemption or a record-review exemption, the inspector was not allowed to expand the inspection beyond the complaint contacting a supervisor. This policy was modified last month by Mr. Pendergrass, but still limits inspectors to basically front-office reviews of employers' written safety programs. Inspectors are now allowed to conduct inspections of actual workplace conditions only in so-called "high-hazard" areas, and may expand the scope beyond such areas only with the permission of their supervisors.

Similarly, complaint inspections involving health hazards are limited to the items on the complaint, and expanded only under the conditions described above (unless the employer is in an industry listed on OSHA's Health Inspection Plan).

Moreover, OSHA refuses to make on-site inspections without a signed complaint from a current employee. According to Chapter IX, Section 2b:

> Former employees are not considered employees for purposes of submitting a formal complaint. They can only submit non-formal complaints. [original emphasis]

Thus, even if workers are fired, their complaints about unsafe conditions will not bring an inspector to the work site. Rather, they will yield only a letter from OSHA to the employer, repeating the workers' complaints as mere allegations. The employers are free to respond in writing, and only one of ten such employers are ever inspected. Little wonder, then, that workers, and particularly unorganized workers, have ceased viewing OSHA as a sympathetic protector of their interests.

However, the right of active workers to file formal complaints should not be taken for granted. The senseless death of Martin Lawless, a 19-year old construction worker at the General Motors factory in Framingham, Mass., in 1986, was a telling example of the effects of OSHA's "screening" process for formal complaints.

IV. CITATIONS

Another terrible weakness in the OSHA's current enforcement scheme is its policy for the classification of violations. This policy deserves special scrutiny because it is largely the classification of the violation which determines both the level of the penalty and the likelihood of any follow-up inspection.

Repeated Violations

For repeated violations, Auchter's 1981 initiative greatly limited the scope of an Area Director's ability to find that a violation uncovered during an inspection had existed previously. For so-called "non-fixed" establishments (e.g. construction, transport, etc.), Auchter reduced the jurisdiction to only that of the Area Office conducting the investigation; it had previously been limited to the same state.

For "fixed" establishment, Auchter limited the jurisdiction to the cited establishment, irrespective of the awareness by a higher level of a corporation about the hazard, or of previous violations elsewhere in the company.

Finally, Auchter required that the subsequent violation must be repeated within three years of earlier citation. All these policies remain intact under Mr. Pendergrass' stewardship, and continue to hamper the effectiveness of OSHA's filed staff.

The horrendous impact of this policy has been vividly documented by the Labor Department's own Inspector General. In its March, 1987 Semiannual Report, the Inspector General reported, based upon OSHA's own case files, that it had found over twenty employers with significant histories of mutliple fatalities. One employer, the OIG stated, had 19 fatalities during a ten-year period.

> However, according to OIG, OSHA had failed to:
>
> 1) Identify or target for inspections those employers with significant numbers of workplace fatalities.
>
> 2) Use its nationwide fatality inspection data in _citing and penalizing repeat violations_. (emphasis added)

Accordingly, the OIG specifically recommended that OSHA:

> 1) Target employers with significant histories of workplace fatalities.
>
> 2) Routinely use all available inspection data in _citing and penalizing such employers_. (emphasis added).

As indicated in Section VI below, OSHA has grossly failed to follow the OIG's recommendations, and many cases of known fatalities go unreported or uninvestigated by OSHA Regional and Area Offices and state plan agencies.

General Duty Clause

Another essential and controversial aspect of OSHA's enforcement mandate is its use of the General Duty Clause. This is necessary to cover the many instances in which employers allow obivous problems to threaten worker safety but for which no specific OSHA standards exist. OSHA has been forced to use the General Duty Clause, for instance, in ints investigations of many fatalities of resulting from employers' neglect of confined-space, lockout or construction safety hazards.

Because this authority is so broad, it was ripe for curtailment by Mr. Auchter. He so restricted the definition of "recognized hazards" that it became impossible for inspectors to make use of legitimate indicators of "recognition" on an industry-wide basis. No longer could widely-publicized recommendations from NIOSH, the American National Standards Institute (itself an industry-dominated group) or the National

Fire Protection Association by used to demonstrate that employers were in fact aware of the seriousness of the hazards to their workers. Only a virtual admittance by the employer in question would now be sufficient. This policy has remained in effect, as well, during Mr. Pendergrass' term.

Grouping of Violations to Lower Penalties

Finally, in order to further reduce the chance that employers would be held financially accountable for the consequences of their neglectful compliance efforts, Mr. Auchter in 1982 instituted a prohibition against multiple penalties for similar violations. Known as "Grouping", it requires inspectors to treat similar violations as a single violation for the purpose of calculating penalites. This poliocy change account for much of the 75% drop in penalties between 1980 and 1982.

The power of this unused authority is evident in OSHA's recently-publicized but unfortunately exceptional enforcement programs. It would have been impossible for OSHA to have justified the substantial penalties against Union Carbide, IBP or the Bridgeport contractors if it had followed its traditional grouping policies. Such penalties are still the exception today rather than the rule. Until this policy is changed, employers will have little financial incentive to comply with OSHA standards.

V. SETTLEMENTS

Once OSHA has a citation, it has the duty to defend it not only against legal challenge before the Occupational Safety and Health REvioew Commission, but also from the political pleadings of employers. Secition of the Act also requires that affected workers be given an opportunity to participate in any such appeals proceedings.

However, contrary to the spirit of the law, OSHA and its Solicitors have routinely ignored the views of workers and their unions in their discussion with employers about settlements of such dusputes. Worse, OSHA has in the past few years begun agreeing to settlements without even issuing a citation first. This completely flies in the face of the Act's construction: Congress clearly intended that when OSHA finds a violation, it say so by issuing a citation, and only then allowing employers to challenge OSHA's findings. The issuance of the citation itself is fundemental to the process.

Contrary to these mandates, OSHA has recently negotiated settlements with the Chrysler Corp. and Scott Paper Co. which completely ignored the rights of workers and severly weakened enforcement. For instance, OSHA virtually accepted Chrysler's word that it would remedy its policy of willfully covering up injury records. The United Automobile Workers were not consulted by OSHA, nor allowed to participate in the discussions with the company. Only after the union objected to the vagueness of OSHA's settlement agreement did the company notify OSHA of a substantial plan to correct the problem.

At Scott Paper, OSHA's favoritism toward the company was even more blatant. Following a large recordkeeping and safety inspection at Scott's large plant in Winslow, Maine, OSHA issued a citation for over 200 willful recordkeeping violations, with a proposed penalty of $813,000. The company appealed the citation, and at the same time discussed with OSHA the yet-to-be-issued citation for safety violations. Without contacting the union, Solicitor of Labor George Salem entered into an agreement with Scott's General counsel Norman Heisman, to issue a citation for safety hazards with no penalties and no specific "abatement dates", both of which are required by Section __ of the Act.

As the Paperworkers later learned, the citation would ultimately cover 2 willful violations, 3 repeated citations and 92 serious citations which involved 506 seperate violations. OSHA Deputy Director Frank White conceded their error to the union, but claimed that the settlement was justified because it encouraged the company to accept the citation and abate the hazards without further legal appeals. However, not surprisingly, the company appealed most of the violations for which it was cited, thus tying the matter up before the Review Commission without any requirement that the cited hazards be abated. In other words, OSHA tried to make a deal behind the union's back, and was double-crossed by the company.

This episode is perhaps commonplace in demonstrating the utter lack of ethics or responsibility by corporate management. We in the trade union movement have come to expect it of companies, and prefer to get our committments reduced to writing in our collective bargaining agreements. However, OSHA's treachery is equally nauseating, and cannot be simply ascribed to naivete. OSHA and the Solicitor of Labor knew exactly what they were getting, which was little, and what they were not getting, which was substantial penalties and significant enforcement. At this point it seems that OSHA would not know how to enforce the Act if it tried.

VI. FATALITIES

As mentioned above in Section III on Citations, OSHA has abysmally failed to properly investigate fatalities or to properly enforce safety standards. In addition, OSHA has failed or refused, absent substantial outside pressure, to investigate the massive cover-up of fatalities by employers.

As OSHA is well aware, there is ample evidence that many workers are killed and their deaths are never reported to OSHA by the employers. For instance, a recent study by the New Jersey Department of Health indicated that for the period 1984-1985, there were 117 deaths in the state in industries covered by OSHA. Of these, thirty-three deaths were never reported to OSHA. This yields a phenomenal non-reporting rate of nearly 30%.

The Colorado Department of Health found similar results, in a study covering 1982-1984: 35% of workplace deaths non-reported, and almost 50% non-reported among rural workers.

A 1987 NIOSH study reported finding the following rates of non-reported fatalities in 1981-1984 involving construction workers in the following state-plan states:

State	Total Deaths	# Not Reported	% Not Reported
Tennessee	73	27	37 %
North Carolina	105	35	33 %
Kentucky	57	16	28 %
Total	235	78	33 %

These figures should surprise anyone familiar with OSHA's complacence regarding fatalities. OSHA has been content to sit silently while the Bureau of Labor Statistics annually reports a national estimate of about 3,700 fatalities which is twice that reported to Federal OSHA. Last year, NIOSH released its landmark National Traumatic Occupational Fatalities study (NTOF) which reported an annual average of 6,100 fatalities (although a minority of these were in industries outside OSHA's jurisdiction). Little wonder, then, that the National Academy of Sciences expert panel on Occupational Injury and Illness Statistics stated in 1987:

> The panel found it rather startling that an agreed-upon method has not been devised to estimate a phenomenon as basic as traumatic death in the workplace.

And what has been OSHA's response to these facts? When the New Jersey Department of Health notified OSHA's New York City Regional Office earlier this year of the names of the employers whose workers had been killed without reporting them to OSHA, the OSHA Regional Office initially refused to take any enforcement action. Indeed, when queried by the Newark (N. J.) Star-Ledger, an OSHA official simply claimed that "if we don't conduct an investigation because we haven't been informed [by the employer], we should not be faulted."

It was only when the newspaper publicized OSHA's refusal to enforce its fatality reporting requirements that the Regional Office changed its view of its responsibilities. We cannot accept OSHA's pathetic willingness to ignore problems as serious as occupational fatalities -- and unreported fatalities at that. It has long been evident that the lives of hundreds -- indeed thousands -- of workers means virtually nothing to this Administration. If for no other reason, this organized negligence must be exposed and halted.

VI. CONCLUSIONS

It is beyond the scope of an initial oversight hearing such as this to discuss the full range of measures needed to remedy the current problems with the enforcement of the OSHAct. Fortunately, may of the answers are already familiar to us, for we had a brief taste of an OSHA committed to enforcement during the Carter Administration. While it was not satisfactory, and in many ways inadequate, it at least pointed the direction: professional leadership, technical competence, vastly increased resources, resistance to political interference by employer representatives, and a willingness to take risks (albeit not often enough) when deciding whether and how to enforce the law.

But we cannot look only to the past. Too much has been learned, the hard way, to allow us to be the least bit satisfied with that model. We know now that even with the doubling of OSHA enforcement staff which is urgently needed, it is no longer enough to place the entire burden of enforcement on representatives of the Secretary of Labor. On the contrary, the time has come to provide the workers themselves, and their designated representatives, with the legal authority to directly challenge the improper safety practices of corporate management.

This will obviously require the amendment of the OSHAct, as will many of the other measures necessary to remedy our current dilemma. On the other hand, in doing so, we will be joining with many other Western industrial democracies, including Canada, Britain, France and the Scandanavian countries -- nations which in many respects have bettered our record on occupational safety and health, and which now provide that protection to workers. I respectfully urge the Committee to seriously consider the possibility of allowing workers to move from the mere "Right-to-Know" to ~~the~~ an effective "Power-to-Act". The experience of the past 18 years has indicated to the trade union movement that we as a nation have no real alternative.

Respectfully submitted,

Eric Frumin, Director
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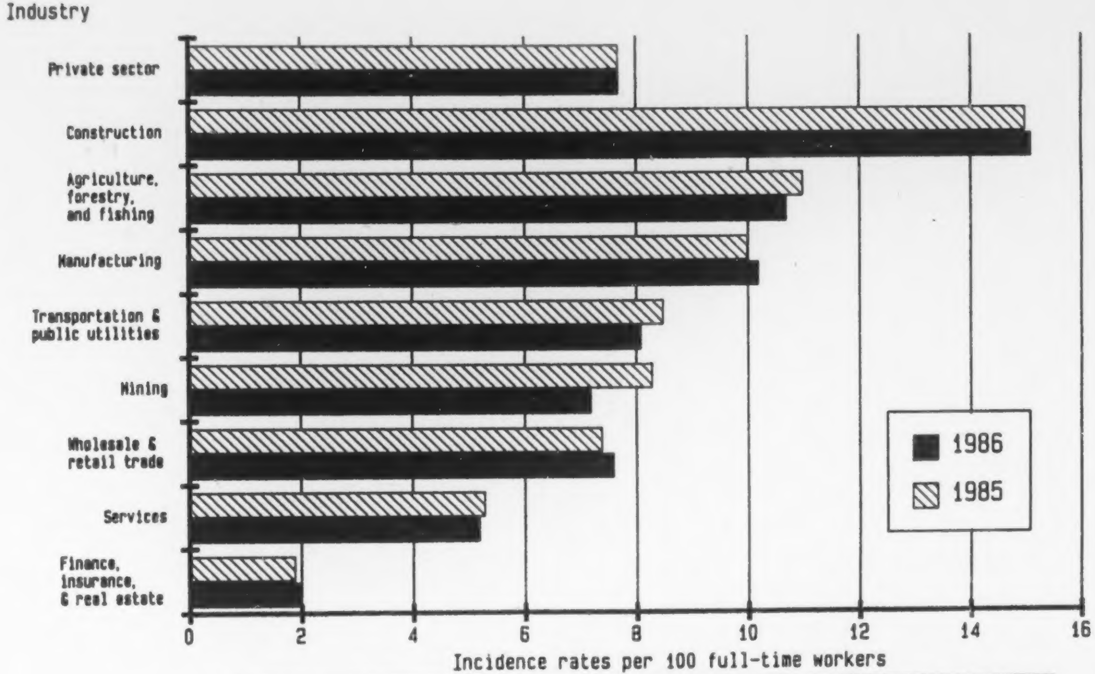
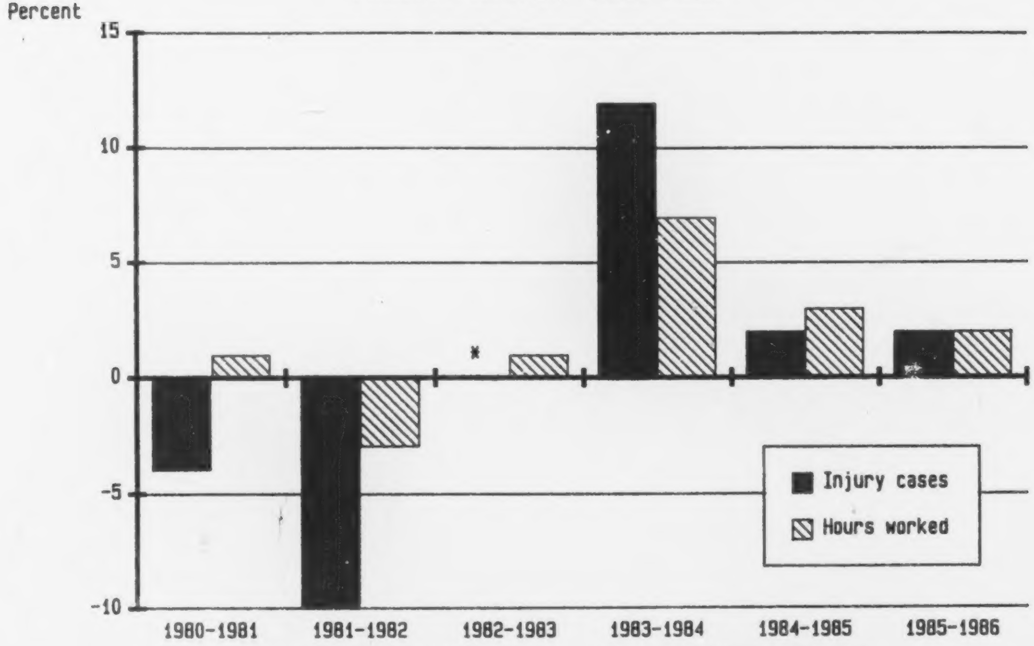
TOTAL INJURY INCIDENCE RATES BY INDUSTRY DIVISION, 1985 AND 1986



The overall injury rate remained the same from 1985 to 1986. Injury rates decreased markedly in mining industries, from 8.3 to 7.2.

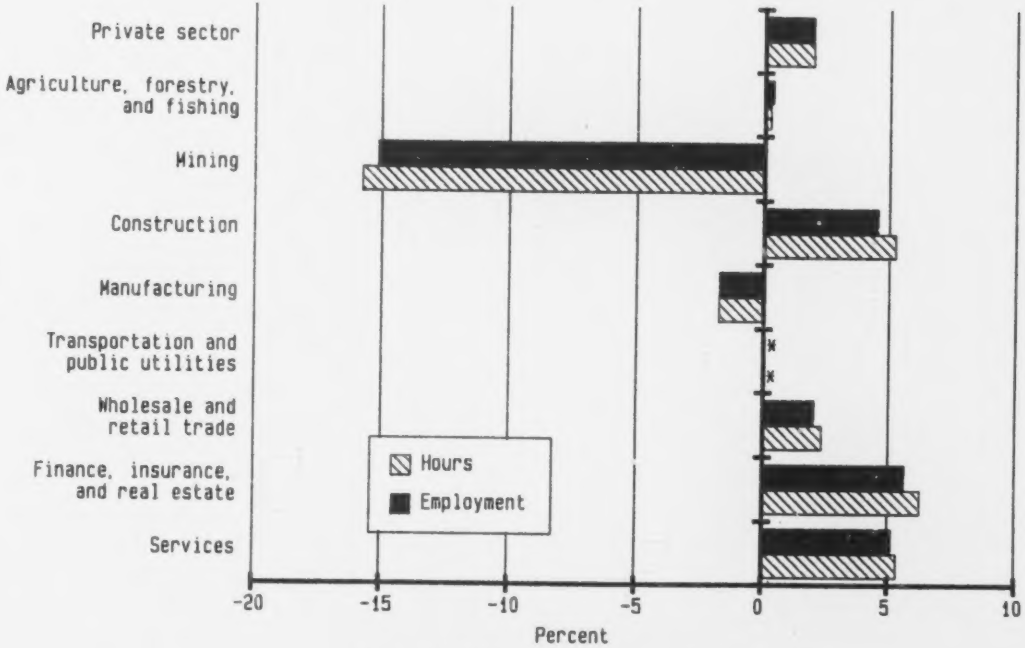
PERCENT CHANGE OF TOTAL INJURIES AND HOURS WORKED, PRIVATE SECTOR, 1980-1986



*Between 1982 and 1983, injury cases showed virtually no change.

From 1985 to 1986, both the number of injuries and hours worked increased about 2 percent. Because these two variables changed at the same rate, the injury incidence rate remained the same.

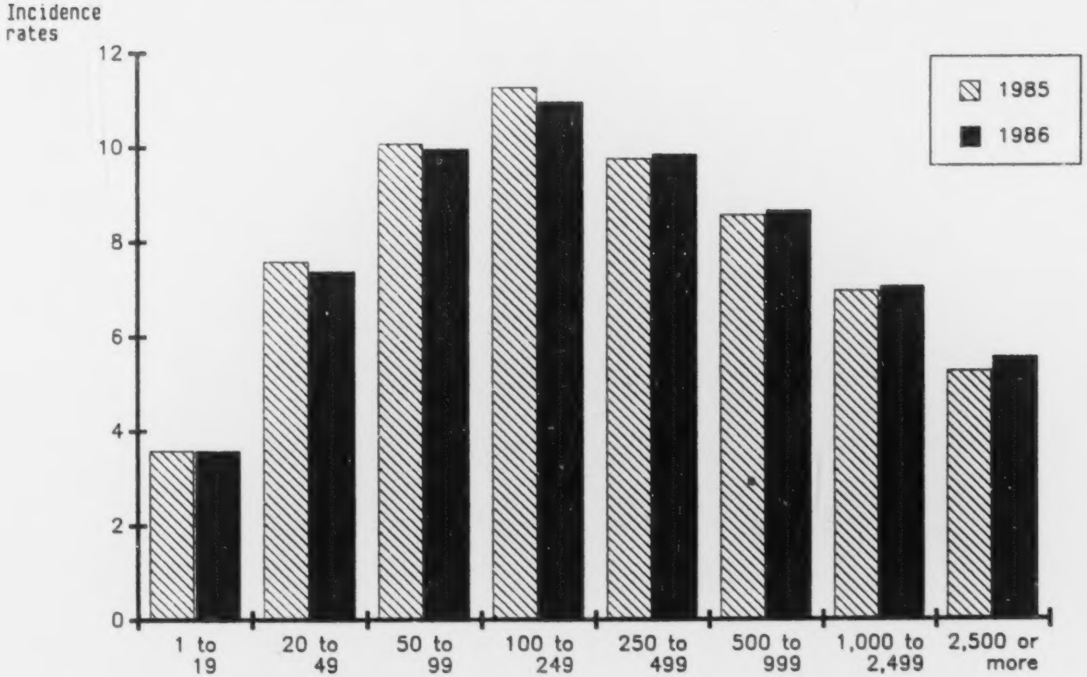
PERCENT CHANGE OF TOTAL HOURS WORKED AND EMPLOYMENT BY INDUSTRY, 1985-1986



* Between 1985 and 1986, the change was less than 0.1 percent.

Changes in employment correspond to changes in hours worked.
The largest decrease occurred in mining industries.

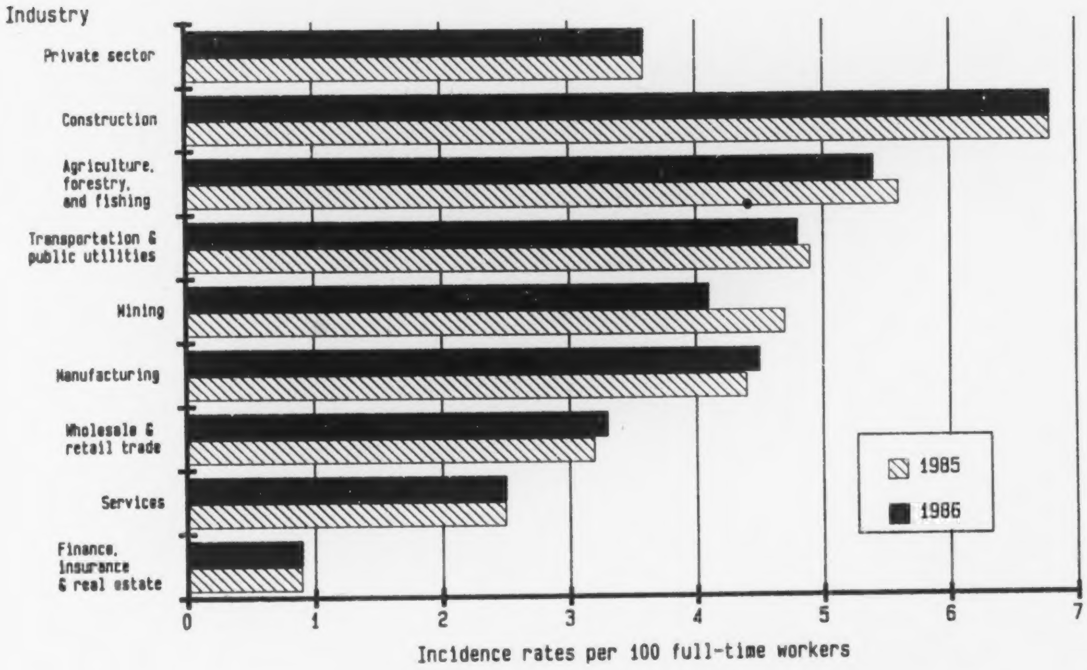
TOTAL CASE INJURY RATES BY EMPLOYMENT SIZE, 1985 AND 1986



NOTE: Incidence rates represent the number of injuries per 100 full-time workers.

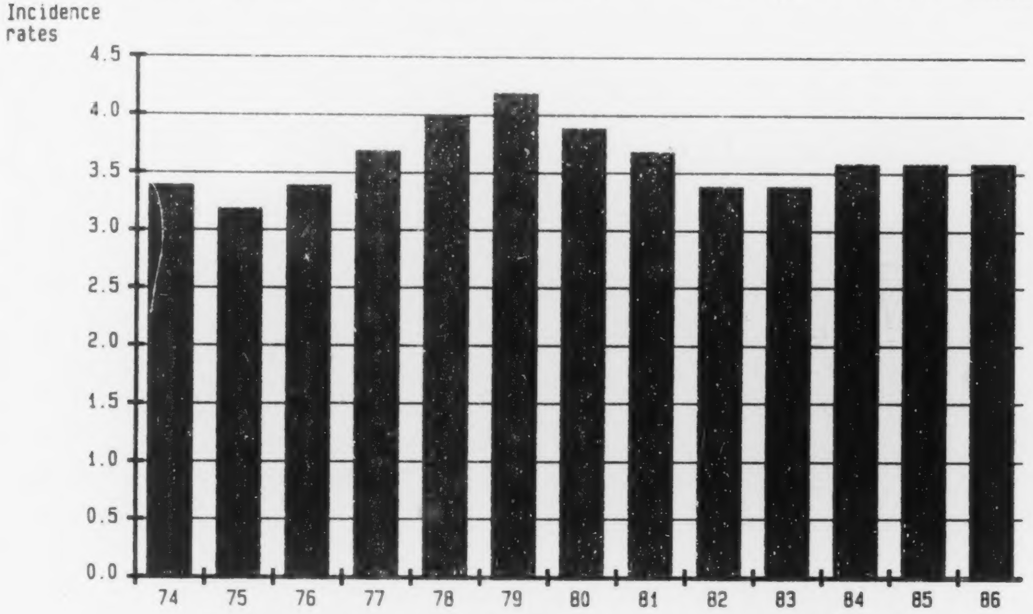
Injury rates were essentially unchanged from 1985 to 1986 in private sector establishments of all sizes.

LOST WORKDAY CASE INJURY RATES BY INDUSTRY DIVISION, 1985 AND 1986



In 1986, lost workday case injury rates ranged from 6.8 in construction to 0.9 in finance, insurance, and real estate.

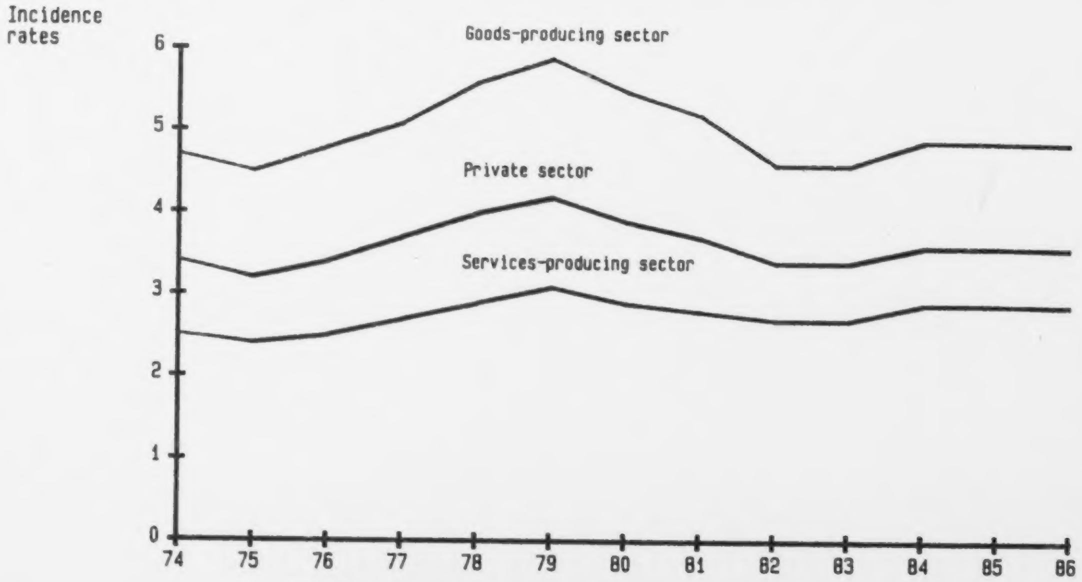
LOST WORKDAY CASE INJURY RATES, PRIVATE SECTOR, 1974-1986



NOTE: Incidence rates represent the number of injuries per 100 full-time workers.

The lost workday case injury rate was unchanged from 1984 to 1986, remaining at 3.6.

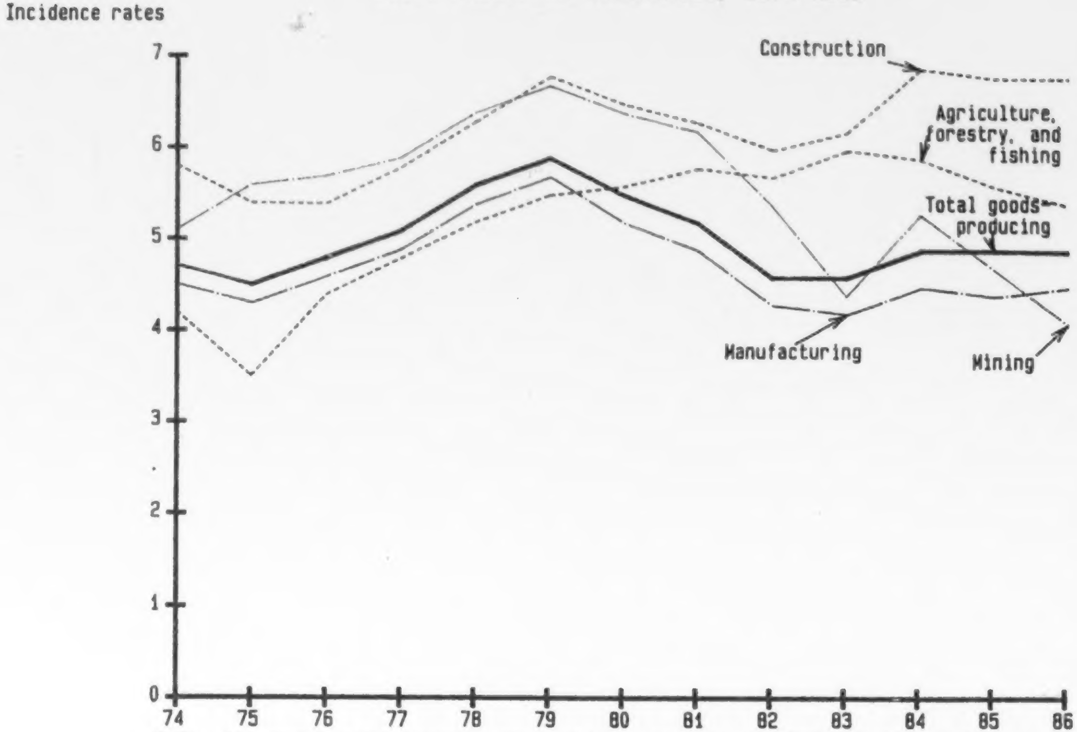
LOST WORKDAY CASE INJURY RATES, TOTAL GOODS-PRODUCING, TOTAL SERVICES-PRODUCING, AND TOTAL PRIVATE SECTOR, 1974-1986



NOTE: Incidence rates represent the number of injuries per 100 full-time workers.

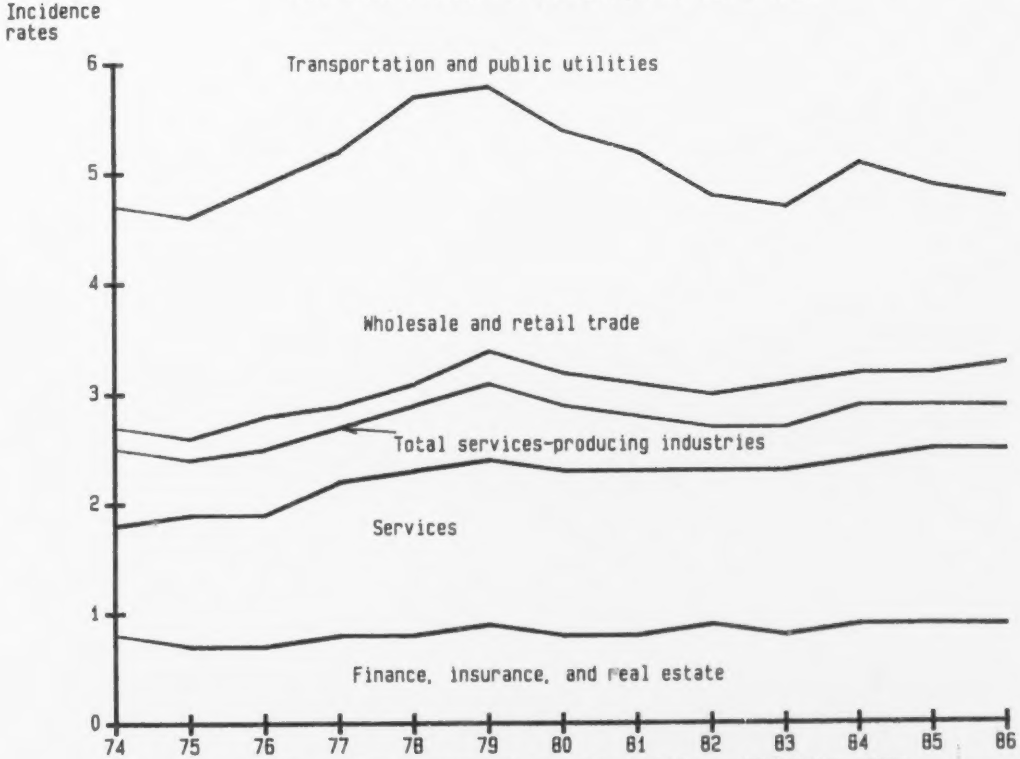
Rates for the goods-producing sector have been consistently higher than rates for the total private sector.

LOST WORKDAY CASE INJURY RATES BY INDUSTRY DIVISION, GOODS-PRODUCING INDUSTRIES, 1974-1986



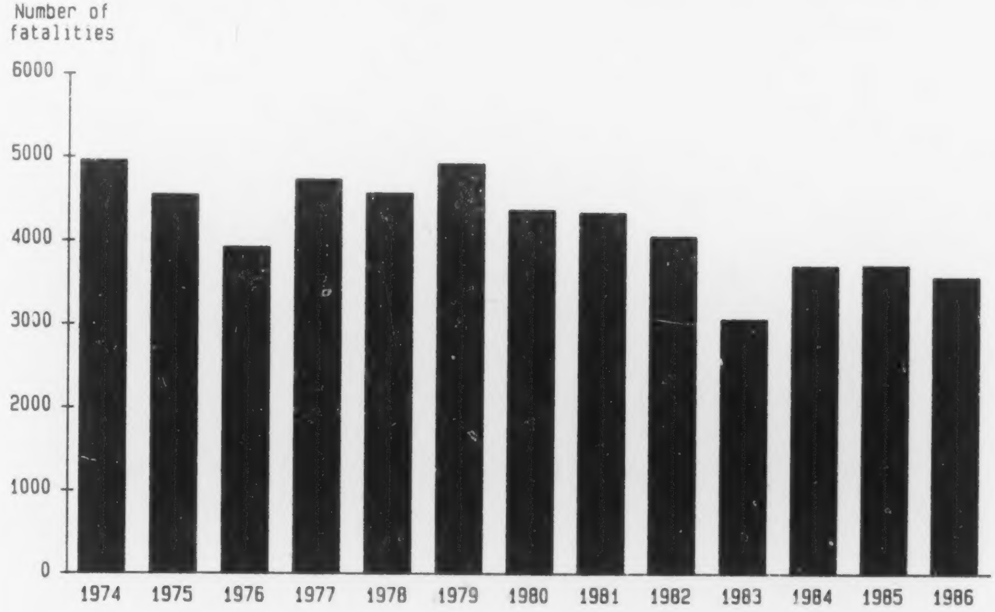
NOTE: Incidence rates represent the number of injuries per 100 full-time workers.

LOST WORKDAY CASE INJURY RATES BY INDUSTRY DIVISION, SERVICES-PRODUCING INDUSTRIES, 1974-1986



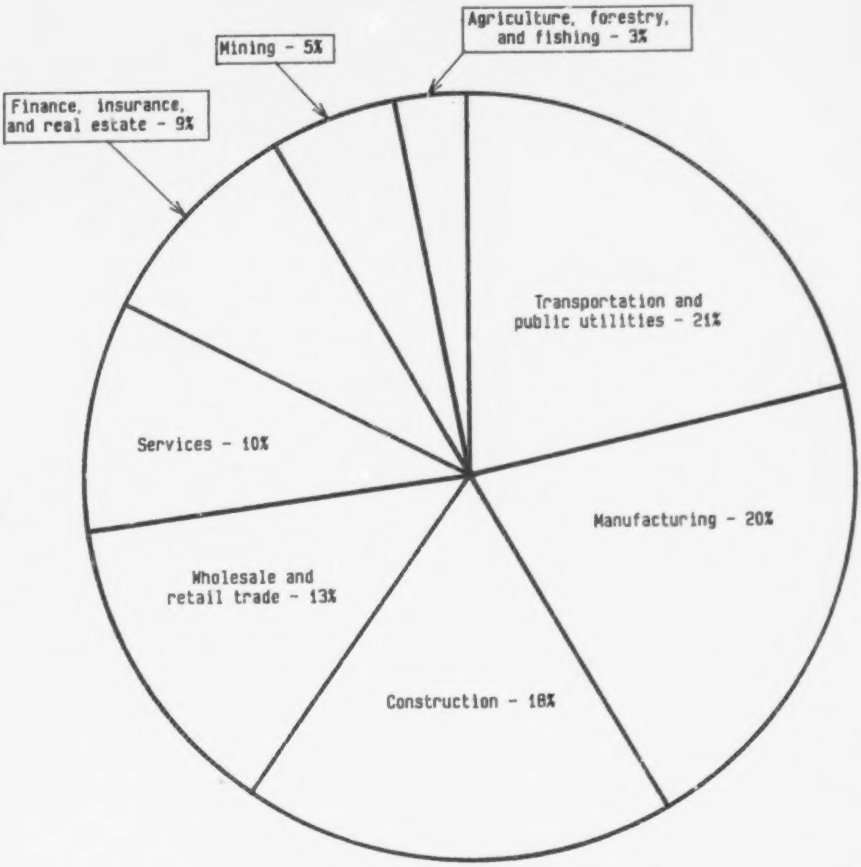
NOTE: Incidence rates represent the number of injuries per 100 full-time workers.

OCCUPATIONAL INJURY AND ILLNESS FATALITIES FOR EMPLOYERS WITH 11 EMPLOYEES OR MORE, PRIVATE SECTOR, 1974-1986



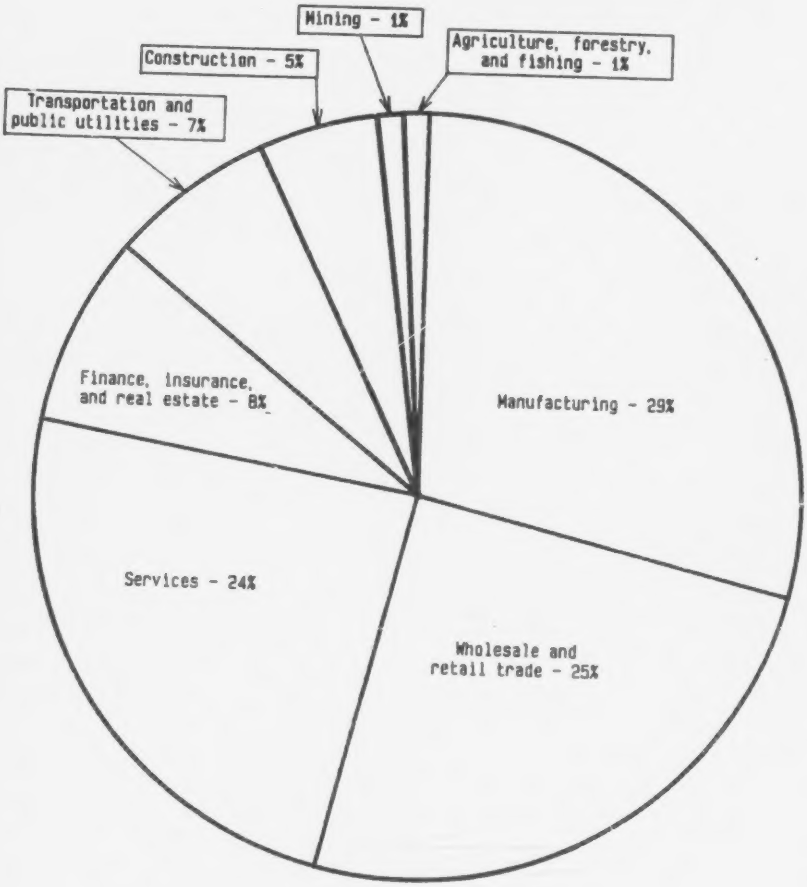
In 1986 approximately 3,610 work-related deaths were reported.

OCCUPATIONAL INJURY AND ILLNESS FATALITIES FOR EMPLOYERS WITH 11 EMPLOYEES OR MORE BY INDUSTRY DIVISION, 1986



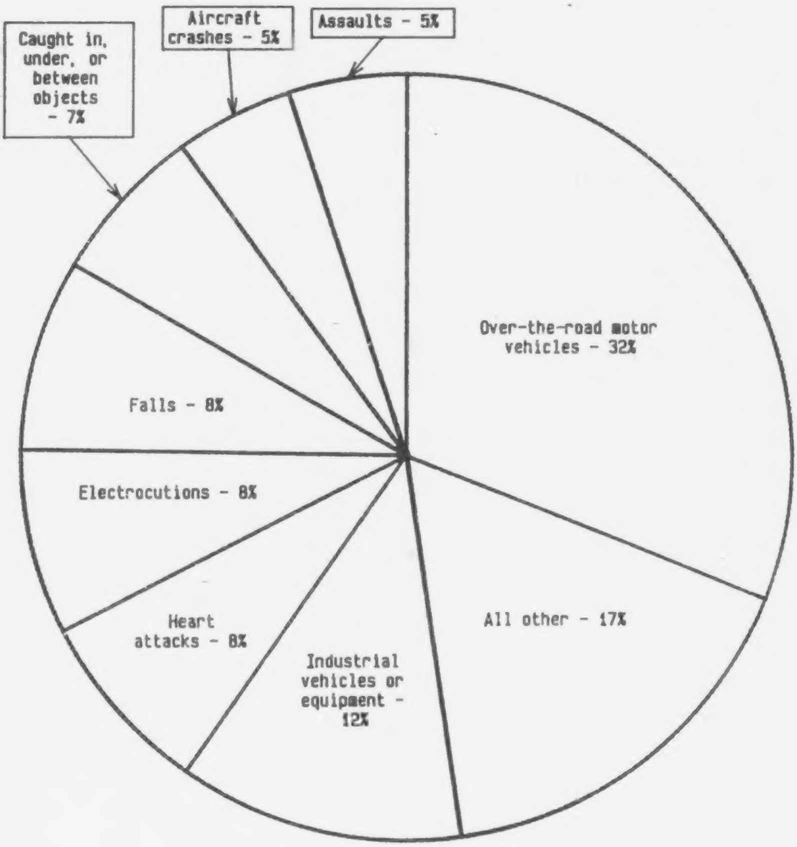
Three of every five fatalities occurred in transportation and public utilities, manufacturing, and construction industries.

PERCENT OF EMPLOYMENT FOR EMPLOYERS WITH 11 EMPLOYEES OR MORE BY INDUSTRY DIVISION, 1986



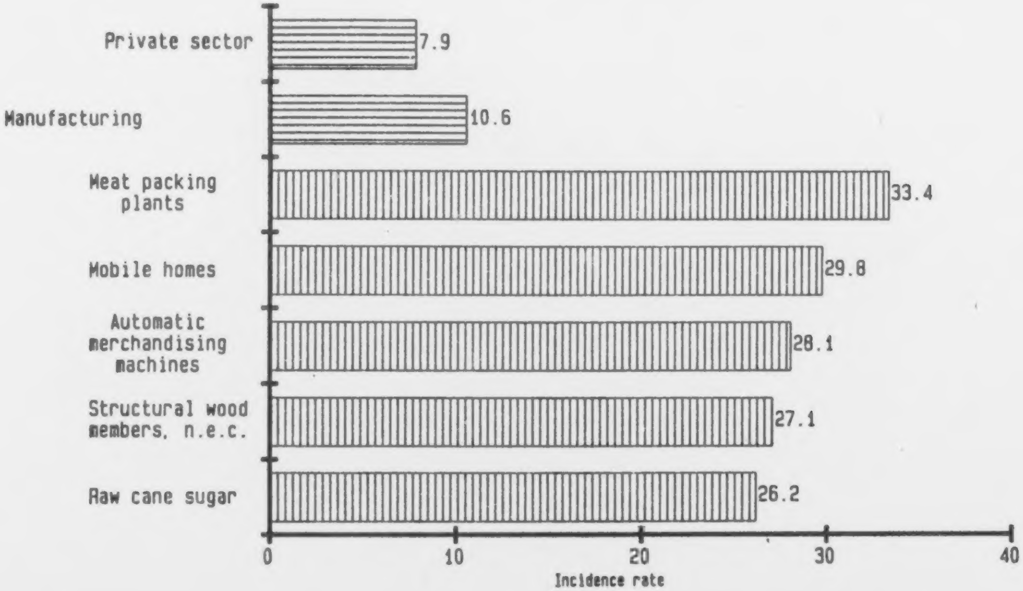
Only 3 industries, manufacturing, trade, and services, represent a percentage of total employment which is higher than its percentage of total fatalities.

PERCENT OF INJURY AND ILLNESS FATALITIES FOR EMPLOYERS WITH 11 EMPLOYEES OR MORE BY CAUSE, 1985 AND 1986



As in previous years, the leading cause of death was over-the-road motor vehicle accidents, accounting for about 30 percent.

TOTAL CASE INJURY AND ILLNESS INCIDENCE RATES FOR THE PRIVATE SECTOR, MANUFACTURING, AND HIGH-RISK INDUSTRIES, 1986



The 5 high-risk industries, those with the highest rates, were involved in manufacturing. On the average, 1 of 4 workers in these industries was injured or made ill on the job. The ratio is 1 in 13 for the private sector and 1 in 10 for manufacturing.

The Chairman. Thank you very much. That was very helpful and disturbing testimony. Let me, Mr. Mirer, go back to you. I have some questions and then we will have some questions for Mr. Frumin as well. You spent a good deal of your testimony on OSHA's standard setting and you mentioned that we know much more about the hazards and how to protect workers than ever before. Can you elaborate on that a little bit?

Dr. **Mirer**. Well.

The Chairman. It should be self evident, but I am interested in what a person of your professional training thinks about that.

Dr. **Mirer**. Okay. Since the OSHA law was passed, which in addition to setting up OSHA, created NIOSH with the ability to conduct workplace studies; and since the Toxic Substances Control Act was passed which has pushed the testing of chemicals to some degree. Although not by direct action of EPA; and since the National Toxicological Program has been conducting tests of chemicals on an ongoing basis, we have finally focused our attention on the large volume, high use, high exposure chemicals which are used in industry. We know a great deal more about their toxic effects. The epidemiological results which I quoted are a small sector, small segment of the results available. The toxicology results cover a wide variety of chemicals. So that is one side. We know where the hazards are coming from now much better than we did 20 years ago.

Secondly, we have had a lot of experience with OSHA standards, with developing chemical exposure control measures in the workplace, with involving workers through the mechanisms of OSHA standards in helping design controls and reduce exposure. We can prove that, by looking at specific industries like the lead battery industry, like the asbestos industry, cotton industry and so forth. We have seen reductions of exposure and we can feel confident that if we extended this process to other chemicals, to other industries, to other situations, that it would work. That we could reduce chemical exposures and, in fact, without the allegedly ruinous cost that industry always attributes to these changes.

The Chairman. Well, what should the OSHA be doing with that information that it is not doing?

Dr. **Mirer**. Well, very simply, the standards process can be greatly speeded up from what it is now. In fact, what is happening now, rulemaking is not introduced unless a union files a petition and goes to court to try enforce rulemaking. But, were the rulemaking process speeded up so that proposals were put out, hearings scheduled, hearings conducted, this would, I think, get all the information out in public and permit standards to be set for the high priority chemicals.

I also think, in addition to that, we need the generic rules, such as a rule that requires employers to monitor exposure of their employees to all the regulated substances. A generic rule of that nature would give us a much better idea of exposure and give workers a better chance to participate in reducing those exposures.

The Chairman. Your union has been very interested in the development of the formaldehyde standard and you also said that the standard which was published was inadequate. How is it inadequate?

Dr. **Mirer**. Well, we do not think that it controls exposure enough. It does not reduce the exposure limit far enough. We believe that the evidence we presented, and others presented in the hearings, show that the formaldehyde exposure can feasibly be reduced substantially less than the one part per million, which is in the standard, which is in fact an industry recommendation several years old. We believe considerable risk, and OSHA's analysis in fact, shows considerable risk to workers exist at the legally prescribed level, the new legally prescribed level. We believe they could, and feasibly should have, set the standard lower than that.

In addition, the medical surveillance requirements in the standard are inadequate to protect workers and, in fact, rely on workers to report their symptoms to the company physician without providing them any protection against retaliation for reporting those symptoms.

Mr. **Frumin**. If I may add, Mr. Senator?

The Chairman. Sure.

Mr. **Frumin**. The largest single group of workers covered by the formaldehyde standard are apparel workers. They constitute about half, according to OSHA's figures, of the total exposed workforce. OSHA has set the various provisions of the standard, exposure limits, so high that for practical purposes most of those provisions never apply affectively to the apparel industry. There are several hundreds of thousands of workers in other industries who are in the same boat. So the standard is really a shell of a standard. It applies effectively, in terms of monitoring air levels, medical surveillance, training and so forth, only to a small minority of the two million workers who are actually covered by it.

The **Chairman**. Mr. Mirer, you also point out that there is a need to protect health care workers from infectious diseases like AIDS and hepatitis B. Are the current guidelines adequate?

Dr. **Mirer**. The UAW represents a substantial number of health care workers, but we have not been the lead union in this area, SEIU and AFSCME have taken the lead in this and have petitioned for a standard. The Centers for Disease Control guidelines are not, themselves, an enforceable OSHA standard. We believe that such a standard would be needed to protect our members in health care settings and other workers in health care settings. OSHA should go forward with rulemaking in the same way that it would for chemical exposure. It turns out that the long known, and not long applied, not well applied, provisions for protection against getting hepatitis from exposure to a contaminated body fluids during health care work, that those provisions will do quite well for perfecting against aids. These simply have to be implemented on an enforcement basis.

The **Chairman**. What did they say when you raised this, or when this issue has been raised with them? Have they given any response?

Dr. **Mirer**. Well, the OSHA reaction was to reject the petition for the emergency temporary standard and to announce that they would attempt to enforce the CDC guidelines under the general duty clause of the OSHA law. We simply think that this is inadequate. It is every employer for himself. Every inspector for himself or herself approach to enforcement. It places too great a burden on resources and it will not work.

The CHAIRMAN. Well we will work with you closely in that area. As you know, this committee has jurisdiction over health. We have had a good deal of hearings, both on the whole question of blood-related disease, AIDS in particular, and there certainly should be action taken in that area. We have addressed the training of public health workers. I think, if my memory serves me correctly, it was a signed amendment on S.1220 which we hope to get passed. But, I just have a few final questions.

On the issue of the grain dust standard, that was watered down, as I understand, by OMB interference. Is that right?

Dr. MIRER. The grain dust standard has been through an extensive period where OMB was holding up the release of that standard. I am not sure what OMB's legislative or other authority for doing it was. But, the standard was held up for an extended period of time. What we have now is quite felt by the unions active in that field, to be quite inadequate to protect against the explosion hazards of grain dust.

The CHAIRMAN. Senator Simon.

Senator SIMON. Just one question, Dr. Mirer. I notice in your statement you talk about collective bargaining in the process. One of the things I hear occasionally from people is, well this ought to be part of the collective bargaining process. The reality is, you should not have to bargain collectively for the safety and health of your employees. You ought to be bargaining for how much an hour you get, or how many hours a week you work. Those kinds of things. But the safety ought to be an assumption that we make in this society. I do not expect you to disagree with me on that, but any comment you may have.

Dr. MIRER. Yes, if I could say a few works. One of the catch phrases in our union is that "OSHA does not work in our plants." We work in our plants, and we have to do the best we can building on the base of the legal protections to provide additional protections into our members. In our major agreements, we have negotiated full-time trained health and safety representatives, joint health and safety committees that have the right and the power to investigate all aspects of health and safety problems in the workplace, the right to take air samples, access to all kinds of health and safety data. In addition to that, we have negotiated programs jointly to apply lockout, which I mentioned, to investigate ergonomics problems, to conduct hazard communication and other health and safety education jointly. These are, in many of the contracts, supported by cents-per-hour funds. Quite a substantial financial commitment has been made to these things. Now, one of our big problems is, it is very difficult to apply this pattern, as well call it, beyond the major companies where we have bargaining power and which have the finances and the corporate structure to look at these kinds of things.

As we move out into even very large companies where we have less smaller contracts, and then to the smaller companies and the smaller plants, it simply becomes very difficult to negotiate these cooperative arrangements, even where there is no money involved. Even where the joint safety committee would cost a pittance, it is still difficult to negotiate that kind of worker participation without our bargaining power.

Senator SIMON. We ought to be protecting people, not just those who are union members in this country. We ought to be protecting everybody.

Mr. FRUMIN. If I could add to that, Mr. Simon? We were engaged in our struggle with J.P. Stevens to get them to abide by the National Labor Relations Act, and to sign a contract with the union. Since we represented its workers, you can believe me when I say that they were no more interested in negotiating an agreement and signing an agreement over health and safety, than they were over wages or hours. They also, still to this day, even though they have signed an agreement and have lived up to that agreement with us, they have thousands of workers who work every day exposed to cotton dust and work with other serious hazards and toxic dyes, who are not members of our union. The Southern textile industry still is largely unorganized. Many industries in the south and southwest are unorganized. These workers will not benefit from collective bargaining until they see fit to organize themselves and to join the trade union movement. So we must see that the Government has a role to step in. I think for this reason, that under a new OSHA Act, a reformed OSHA Act, that workers are given a power to act. That is something that we need to start thinking about, start planning for.

Senator SIMON. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Just finally, could you tell us, Dr. Mirer, you mentioned that there had been a preference for performance standards recently in OSHA. What is a performance standard?

Dr. MIRER. A performance standard contrasts with a specification standard. A specification standard describes, for example, the nature of the guarding, the number of feet per minute of ventilation through a particular opening, how high, how big a door has to be in that nature. A performance standard sets a criteria, a immeasurable criteria for achievement. A Permissible Exposure Limit is a performance standard. It says you may have 50 micrograms of lead in air. The problem with performance standards in the safety area is that it is very hard to define what the performance is. The most obvious performance standard in the safety area is to say we do not care what you do in your plant as long as the injury rate is below a certain number."

We have already seen through these citations that it is much easier to get your injury rate down with a sharp pencil than it is by actually going out and abating the hazards and preventing the injuries.

The CHAIRMAN. Okay, very helpful. Mr. Frumin, you talk about the primary methods used by the Reagan Administration to undermine the enforcement have been exemptions of major industrial sectors from inspection. Could you elaborate on that?

Mr. FRUMIN. The exemptions policy, of course, first surfaced in the OSHA Improvements Act of 1980 supported by Senator Schweiker, which proposed a scheme to give employers, really throughout industry, a guaranteed exemption from various kinds of OSHA inspections based on their injury rates. Having failed there, the Reagan Administration and Assistant Secretary Auchter established by fiat a similar policy which said that, throughout the manufacturing industry, and it was limited to manufacturing, but throughout that industry, any employer whose rate of disabling injuries was below a bench mark established according to the Bureau of Labor Statistics injury rates, would be guaranteed exemptions from shop-floor safety inspections by OSHA.

So it covered virtually all of manufacturing and thousands of workplaces, probably hundreds of thousands of workplaces with millions of workers. These are industries which we know well to be dangerous. The textile industry, the automobile manufacturing industry, chemical industry, petro-chemical industry. Major sectors of manufacturing were completely exempted from regular surprise safety inspections.

The CHAIRMAN. Let me play the devil's advocate? What is wrong with that as long as they are coming up with the results and as long as they are keeping injuries down?

Mr. FRUMIN. Well, what are the results?

The CHAIRMAN. If the record is better than average then what is wrong with that?

Mr. FRUMIN. Two things are wrong with it. First, we cannot establish under such a scheme what the results really are because OSHA decided to leave it up to the employers to keep their own injury records. I suppose if we wanted to go to the point of having a OSHA inspector in every plant keeping the injury records, well, we might conceive that under those circumstances it might be adequate. But that is obviously not what anyone has in mind. It is not necessary. The other problem with it, is that even if arguably speaking, employers could be relied upon to keep accurate records, the fact is that everybody needs a little bit of oversight. The IRS believes in that. I mean, they assume that most of us are honest, but they audit a lot of honest people. They do not just take my 1040. Every so often they are going to get around to all of us. I think that is a good idea.

The CHAIRMAN. I suppose if you find the kind of situation which you commented on earlier where you are apparently having the under-reporting of a number of deaths that same problem might very well come for other accidents as well?

Mr. FRUMIN. Oh, sure. OSHA does not require employers to report non-fatal injuries, other accidents, except when five workers have been hospitalized, which is a pretty horrendous threshold. MSHA does not operate like that at all. All injuries get reported to MSHA. OSHA really does not have an accurate figure of serious injuries. We have to rely only on the employer records.

The CHAIRMAN. All right. Then you say also, restrictions on OSHA's ability to investigate worker complaints have undermined enforcement. Could you elaborate on that?

Mr. FRUMIN. Well OSHA puts workers through a number of paces to force them to follow certain procedures and come up with certain facts in order to file what they call a formal complaint. We had a horrendous situation about a year ago in Framingham, Massachusetts when a group of workers, construction workers, unionized workers, were working at an addition to the GM plant there. A business agent from the plumbers union was given the runaround by the OSHA officer, according to their procedures, about problems with holes in the floor and poor safety management by this contractor. He said look, this is an imminent danger, come on out here. They gave him a run around. The guy represented plumbers. So he filed a complaint. Accordingly to OSHA, the complaint could only come from the business agent of whatever other craft was affected. While OSHA was fiddling with papers, a 19 year old kid working there with his father, falls through a hole and gets killed. This is outrageous. This is just unacceptable in a civilized society.

The CHAIRMAN. I am very familiar with that case. That was really an extraordinary tragedy. We are going to hear from a person who can tell us, in greater detail, about that later in the course of the hearings. I want to thank both of you very, very much. Your testimony is very, very helpful to the committee and we look forward to working with you after the conclusion of these hearings about how we are going to address some of these grievances and what steps would be useful in terms of strengthening the legislation. We want to thank you very, very much.

Dr. MIRER. Thank you, very much.

Mr. FRUMIN. Thank you very much.

The CHAIRMAN. Our last panel consists of experts in the field of occupational safety and health. We welcome Dr. Philip Landrigan, of Mount Sinai Hospital in New York; Mr. John Moran, formerly of NIOSH, and Dr. Earl Pollack of George Washington University.

Dr. Landrigan, we will start with you, if we could, please.

STATEMENTS OF DR. PHILIP J. LANDRIGAN, DIRECTOR, DIVISION OF ENVIRONMENTAL AND OCCUPATIONAL MEDICINE, AND PROFESSOR OF COMMUNITY MEDICINE AND PEDIATRICS, MOUNT SINAI SCHOOL OF MEDICINE, NEW YORK, NY; JOHN B. MORAN, PAST DIRECTOR, DIVISION OF SAFETY RESEARCH, NIOSH, MORGANTOWN, WV; AND DR. EARL S. POLLACK, STUDY DIRECTOR, PANEL ON OCCUPATIONAL SAFETY AND HEALTH STATISTICS, COMMITTEE ON NATIONAL STATISTICS, NATIONAL ACADEMY OF SCIENCES-NATIONAL RESEARCH COUNCIL, WASHINGTON, DC

Dr. LANDRIGAN. Thank you, Mr. Chairman.

Thank you for having invited me to testify before you this afternoon. I am Professor of Community Medicine and Pediatrics at the Mount Sinai School of Medicine in New York City, and I direct the Division of Environmental and Occupational Medicine at Mount Sinai. Prior to my coming to New York three years ago, I served for 15 years in the U.S. Public Health Service; for the last six of those years, I served in Cincinnati as Director of NIOSH's Division of Surveillance, Hazard Evaluations and Field Studies.

Occupational disease is highly prevalent in the United States today. Although 18 years have elapsed since the OSHA Act in 1970, success in reducing work-related disease has proved elusive.

Mortality for certain forms of cancer appears to be increasing; occupational exposures appear to account, at least in part, for that increase. Lead poisoning is widespread. Asbestos-related diseases are killing approximately 10,000 workers each year in the United States. Silicosis, which is a disease of the lungs which has been recognized since antiquity, is still common in miners and foundry workers in this country.

We have recently had the opportunity to undertake a survey in New York State to estimate the current burden of occupational disease. On the basis of these extensive estimates which we conducted in conjunction with the New York State Legislature and the State Departments of Labor and Health, we have calculated that each year in New York State, there are between 5,000 and 7,000 deaths which result from exposures in the workplace. These, I should emphasize, are not deaths which result from acute trauma, but rather, delayed deaths which result from exposures in the workplace to toxic substances.

The deaths due to occupational disease include 3,700 deaths from cancer and between 1,000 and 3,000 deaths each year from pulmonary and cardiovascular and kidney and neurologic diseases combined.

Additionally, each year in New York State, there are some 35,000 new cases of work-related illness.

It is possible to develop crude national estimates of the burden of occupational disease across the entire United States by multiplying the New York data by 10, since New York has about one-tenth of the nation's work force; by this mathematical operation, it is possible to calculate that each year across the country, there are between 50,000 and 70,000 deaths resulting from exposures to toxic substances in the workplace and approximately 350,000 new cases of illness.

The CHAIRMAN. Let me just go over that figure again, because that is really a startling figure. Can you give us that figure about occupational disease in the United States, the number of people who die from occupational disease?

Dr. LANDRIGAN. Yes, Senator. Let me just give a bit more detail on how we arrived at those numbers. Further background is presented in a report which we have prepared for the New York State Legislature, entitled "Occupational Disease in New York State", which I will be pleased to submit to the record, Table II-1 in that book.

[The table referred to follows:]

The first section of this chapter summarizes the available morbidity and mortality data and the procedures used to develop annual estimates of disease and death. The second section describes each source of information in detail and examines its strengths and weaknesses.

ESTIMATES OF DEATH AND DISEASE

Mortality (Deaths)

In Table 2-1, two estimates of deaths due to occupational disease in New York State are presented.

By our calculations, between 4,686 and 6,592 deaths occur each year in New York State as the result of occupational exposures (column 4). However, according to New York State Workers' Compensation data, only 233 work-related deaths occur annually (column 5). The estimated number of deaths associated with occupation (column 4) was generated using a proportional attributable risk approach. To obtain the number of deaths attributable to each category of disease, the percentage of each cause of death estimated to result from occupational exposures (column 3) was multiplied by the average number of deaths from that cause occurring each year in New York State (column 2). In the case of cancer, an average of 37,081 deaths occur in New York State each year. Analysis of the available literature indicates that 10% of these deaths result from occupational exposures (Appendix 1). Multiplying the 37,081 total cancer deaths by 10% results in an estimate of 3,708 occupationally-related cancer deaths.

By this same approach, attributing 10% of cancer deaths, 100% of deaths from pneumoconioses, and 1-3% of cardiovascular, chronic respiratory, renal and neurologic deaths to occupation, between 4,686 and 6,592 of the approximately 167,000 annual deaths in New York State may be ascribed to occupational disease.

This range of estimates is considered conservative, i.e., it provides a low estimate of total occupational mortality. A low estimate is generated because proportional risks were applied to deaths from only six conditions: cancer, pneumoconioses (dust diseases of the lung), cardiovascular disease, chronic respiratory (lung disease, neurologic illness, and renal (kidney) disease. Furthermore, in each case, conservative proportional risk estimates were selected from the range of figures available. A detailed discussion of the rationale for selecting each percentage is included in Appendix 1.

TABLE 2-1

Occupational Disease Mortality Estimates

(1) Cause of Death	(2) Average Total Annual Mortality, NYS 1979 - 82	Estimated Proportion and Number of Deaths Associated With Occupation		(5) Average Annual Occupational Disease Deaths Reported by Workers' Compensation
		(3) Percent	(4) Number	
Cancer	37,081	10%	3,708	3
Pneumoconioses	25	100%	25	34
Chronic Respiratory Disease	4,104 *	1-3%	41 - 123	3**
Cardiovascular Disease, Renal Disease and Neurologic Disorders	91,213	1-3%	912 - 2,736	176
Other Conditions	34,631	—	—	17
TOTAL	167,054	—	4,686 - 6,592	233

*Includes emphysema, asthma, bronchitis, bronchiectasis and allergic alveolitis (ICD 490-496)

**Includes all non-toxic respiratory system conditions

Sources: Vital Statistics of New York State, 1979-1982; Compensated Cases Closed, State of New York Workers' Compensation Board Division of Research and Statistics, Bulletins Nos. 40-43; 1979-1982.

The second set of numbers in Table 2-1 (column 5) is the average number of occupational disease deaths reported annually by the New York State Workers' Compensation Board between 1979 and 1982. During that time, Workers' Compensation reported an average of 233 occupational disease deaths per year.* As will be discussed in detail below, it is estimated that the actual number of occupationally associated deaths is at least 6-33 times greater than this number reported by the Workers' Compensation Board. It is remarkable that even if Workers' Compensation reports of cancer deaths were increased by a factor of 10, the resulting estimate of 30 cancer deaths would be negligible and is clearly an enormous underestimate. Thirty cancer deaths represents less than one-tenth of one percent of cancer deaths in the State, 25 times less than the lowest estimates of occupational cancer to be found in the medical literature.

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*All non-traumatic accidental conditions have been incorporated into the disease category (e.g., heart attacks and infectious diseases are included under "diseases").

With the exception of the information on pneumoconioses, the estimates in Table 2-1 of occupational disease mortality based on proportional attributable risk are substantially more realistic than the Workers' Compensation estimates. Pneumoconioses are often misdiagnosed on death certificates. Hospital discharge data for New York State suggest that pneumoconioses may develop 5 to 10 times more often than reported (see page 11 and Table 2-4). If the 34 deaths due to pneumoconioses reported by Workers' Compensation are multiplied by 5 to reflect this undercounting, a composite estimate of approximately 4,800-6,800 annual occupational disease deaths is obtained for New York State:

Estimated Annual Occupational Disease Deaths

Cancer	3,708
Pneumoconioses	170
Chronic respiratory disease	41 - 123
Cardiovascular, renal, and neurologic disorders	912 - 2,736
TOTAL	4,831 - 6,737

It is important to consider these figures in the context of data on overall mortality. There are 167,000 deaths in New York State each year. The estimated 5,000-7,000 deaths attributable to work-related exposures constitute 3-4% of total deaths, making occupational disease the fourth most common cause of death in New York. Only heart disease, cancer and stroke cause more deaths each year than occupational disease. Every year, twice as many people die from work-associated diseases as die from homicide and suicide combined; 1.5 times as many people die from occupational disease as from accidents, and more than twice as many residents of New York State die from work-related conditions each year than have died from AIDS since that disease was first identified in 1981. Clearly, occupational disease is a major health issue.

Morbidity (Illness)

In all disease surveillance systems, reporting of fatal conditions is more complete than reporting of less severe conditions. As a result, estimates of non-fatal occupational illness are even less precise than those for mortality.

The CHAIRMAN. It will be made a part of the record.

Dr. LANDRIGAN. From New York State vital statistics, we have the numbers of deaths from the various major causes—cancer, heart disease, neurologic disease—which occur each year in the State. We reckon that ten percent of all cancer and between one and three percent of all deaths from chronic respiratory disease, neurologic disease, and kidney disease are due to toxic occupational exposures.

My feeling as an experienced physician in the field is that these, in fact, are low numbers. However, we purposely went on the conservative side lest we be accused of exaggerating the database. Putting these figures together, we calculated that each year in New York State, there are between 5,000 and 7,000 work-related deaths, which result as a consequence of toxic exposures that have occurred in the past.

When these New York State figures are multiplied for the whole Nation, we calculate that there are between 50,000 and 70,000 deaths each year in the United States which result from toxic occupational exposures.

The CHAIRMAN. Well, that's a startling figure. You also mentioned, I guess, 330,000 illness.

Dr. LANDRIGAN. Yes, sir. In New York State, about 35,000 new cases of illness, and ten times that number across the country, for a total of 350,000.

The CHAIRMAN. Are we making any progress in cutting that number down?

Dr. LANDRIGAN. It is hard to say with any great certainty. Surveillance systems for tracking occupational disease and occupationally-related death are notoriously weak.

Your colleague, Mr. Frank, from Massachusetts held hearings on OSHA's surveillance systems several years ago. He described those systems as outdated, fragmented and 70 years behind the times.

The best I can do by way of looking at trends over time is to compare these numbers I have presented today with some numbers which were developed more than a decade ago by NIOSH and OSHA and which were widely publicized by Professor Nicholas Ashford of the Massachusetts Institute of Technology.

At that time, it was estimated that there were 100,000 deaths each year and 400,000 new cases of work-related illness each year in the United States. The numbers I have given you today are really not very different from those numbers, given the uncertainty of the measurement.

The CHAIRMAN. Okay. Please continue.

Dr. LANDRIGAN. We have also had the opportunity to estimate the annual costs, both direct and indirect, of occupational disease. We calculate that each year in New York State, these costs total at least $600 million per year. Multiplying those numbers by ten again, we calculate that the approximate annual cost of work-related disease, excluding injury, across the United States is at least $6 billion.

It is important to recognize from the point of view of cost containment in the health care field, which is certainly an issue of interest today, that these are preventable diseases. If those diseases could be prevented and the attendant costs reduced, then there would be substantial savings accruing to the health care system.

I would like now to address two specific areas in which OSHA has failed from the point of view of preventive medicine and public health to accomplish its mandated duty.

It has failed first in the area of standard setting, and secondly in the area of enforcement.

OSHA's failure in setting standards can be appreciated by a review of their long delay in promulgating the protective standard against benzene. Benzene is an organic solvent. It is well-recognized to cause leukemia and other diseases of the blood-forming organs. Those associations have been recognized by clinicians since the early years of this century.

In 1978, in order to prevent leukemia in workers exposed to benzene, OSHA proposed to lower the exposure standard from ten parts per million to one part per million (ppm). On July 2, 1980, in response to a suit that was filed by the American Petroleum Institute, the U.S. Supreme Court invalidated the OSHA benzene standard of one part per million. The Court stated that OSHA had failed to provide substantial evidence of the need for new regulation in that it had not quantified a significant risk of health impairment at an exposure of ten ppm. As a result of that decision, the standard returned to ten ppm.

Now, I realize this is not a hearing on the Supreme Court. However, for the purposes of this afternoon's hearing, it is important to recognize that by 1981, only one year after the Supreme Court decision, OSHA had obtained sufficient information from several diverse sources to effectively have reversed the Supreme Court decision. By 1981, OSHA's own staff had completed a quantitative assessment of the risk of leukemia associated with occupational exposure to benzene. Another quantitative estimate of the risk of leukemia in persons occupationally exposed to benzene was completed in 1981 by the International Agency for Research on Cancer of the World Health Organization.

Each of those authoritative analyses documented the occurrence of excess incidence and excess mortality from leukemia in workers exposed to benzene at a level of ten parts per million. Each of those analyses indicated that reducing exposure would reduce the risk of leukemia. Each showed unequivocally that significant reduction in risk would result from reduction in exposure.

In short, those two analyses, one inside and one outside of OSHA, would have enabled OSHA very easily, as early as 1981 or 1982, to have met the tests imposed by the Supreme Court and to have lowered tenfold the benzene standard.

Nevertheless, OSHA did not finally reimpose a stringent standard on benzene until just a few months ago in late 1987, when the agency finally reimposed a standard of one part per million.

Our group at Mount Sinai has had an opportunity to estimate the number of lives which ultimately will be lost from leukemia in the 10,000 or so American workers who were necessarily exposed to high levels of benzene during this ten-year delay in the setting of the benzene standard. In this estimate we have used risk figures which were developed by OSHA itself. These figures are actually more conservative than some other figures which exist in the literature, but we chose to take the lower OSHA numbers in order to avoid charges of exaggeration.

Using these OSHA data, we calculate that between 19 and 65 leukemia deaths will eventually result from exposures to benzene which occurred in the past decade between 1978 and 1987 in excess of one part per million.

A similar story can be told of OSHA's delay in setting the formaldehyde standard. I will not go into that in detail. Dr. Mirer from the UAW has already covered the matter in great detail. But I would like to mention in connection with formaldehyde that we have also had the opportunity to calculate the number of illnesses and deaths which will ultimately result from the delay in regulation. We calculate that during the eight-year period which elapsed between the first laboratory finding of carcinogenicity of formaldehyde and the final setting last year of the OSHA standard at one part per million, that some 13,000 American workers were exposed to formaldehyde at levels between one part per million and four parts per million.

Again using OSHA's own risk data, it may be calculated that some 5,900 cases of respiratory irritation and 11,000 cases of dermatitis resulted each year for eight years from that exposure.

Additionally, it can be calculated that between 7 and 48 cases of cancer will ultimately develop in these workers as a direct result of their inadequately-regulated exposure to formaldehyde.

With regard to OSHA's failure to enforce, you have heard extensive testimony here already about the reduction of OSHA's enforcement activities. I don't want to retread that ground. I do, however, want to present some information that we have developed in New York State in which we have attempted to look quantitatively at the effect on workplace exposures of the reduction which has occurred in OSHA's enforcement activity.

We examined OSHA's enforcement records for New York State for two well-known toxins—silica and lead. In the case of silica, OSHA conducted 103 inspections in New York State between 1980 and 1985. In 40 percent of these inspections, OSHA found at least one silica exposure above the standard. Even more disturbingly, in four of seven factories where OSHA went back and did a second inspection after having already found excessive levels in a first inspection, silica levels were still above the standard on the second inspection.

This finding indicates to us that OSHA is enjoying little success in creating respect for the law on silica.

In the case of lead, OSHA conducted 170 inspections in New York from 1980 through 1985. Elevations above the standard were found in 32 percent of these inspections. OSHA went back and did second inspections in eight factories. In seven of these eight factories, (88 percent) where OSHA did repeat inspections, lead levels were still above the standard in the second inspection.

A particularly egregious example of OSHA's failure to enforce the law is provided by the case of the Pymm Thermometer Company in Brooklyn. The details of this tragic case are summarized in my testimony. Suffice it to say for now that in this situation, workers were heavily exposed to liquid metallic mercury, under conditions that can charitably be described as medieval. In 1981, OSHA inspected the Pymm Thermometer Company and cited them for overexposure of workers to mercury. However, rather than enforce that citation, OSHA instead granted the firm a series of extensions. OSHA did not require that the firm comply with the law, and OSHA did not require that the firm abate the hazard.

As a result of this delay in enforcement, almost 50 workers continued to be exposed to excessive concentrations of mercury. Several of these workers appear to have suffered irreversible brain damage as a result of that exposure. The hazard was not brought under control until the New York State Attorney General and the Brooklyn District Attorney brought criminal charges against the firm's owners.

In conclusion, Mr. Chairman, major shortcomings surround the policies and activities of the U.S. Occupational Safety and Health Administration. OSHA has failed to act. It has failed to regulate. It has failed to enforce the law. It has failed to create a climate of respect for the law.

In consequence, too many irresponsible businesses like Pymm Thermometer have felt free to flaunt the law. They have recklessly overexposed their workers to a wide variety of substances, even to substances whose toxicity has been known for centuries. The result has been sickness and disability and death—all of it preventable and unnecessary.

These oversight hearings are very welcome. It is clear that they serve as an effective means of examining OSHA's policies. I suspect that OSHA's recent decision to return to a program of more active field inspections is not unrelated to your decision to hold these hearings today.

Finally, I would like to suggest that OSHA's programs for the future be strengthened in four areas:

There needs to be a more efficient and more scientifically responsible procedure for standard setting. A good start could be made in this direction if OSHA were to be more closely allied to the National Institute for Occupational Safety and Health, (NIOSH).

Enforcement clearly must be strengthened. In particular it must be strengthened in the case of willful and repeated violations.

A strong case can be made for expansion of OSHA's consultation service.

And lastly, programs of worker education should be strengthened.

I would be pleased to answer any questions you may have.

The CHAIRMAN. Very good, very helpful—very distressing.

[The prepared statement of Dr. Nandrigan follows:]

Testimony before the
Committee on Labor and Human Resources
United States Senate

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Philip J. Landrigan, M.D., M.Sc.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE.

Thank you for having invited me to testify before you today at these oversight hearings on the Occupational Safety and Health Act. My name is Philip J. Landrigan, M.D. I am Professor of Community Medicine and Pediatrics and Director of the Division of Environmental and Occupational Medicine in the Mount Sinai School of Medicine in New York City. Prior to my joining the faculty at Mount Sinai, I served for fifteen years as a Commissioned Officer in the U. S. Public Health Service, and from 1979 to 1985, I was Director of the Division of Surveillance, Hazard Evaluations and Field Studies of the National Institute for Occupational Safety and Health. A copy of my curriculum vitae is attached.

THE BURDEN OF OCCUPATIONAL DISEASE IN THE UNITED STATES.

Occupational disease is highly prevalent in the United States today. Although eighteen years have elapsed since passage of the Occupational Safety and Health Act in 1970, success in reducing work-related illness has remained elusive. Mortality for certain forms of cancer appears to be increasing;[1] occupational exposures may account, at least in part, for this trend. Asbestos, although used less frequently than in the past, remains widely dispersed; approximately 10,000 asbestos-related deaths are expected to occur in the United States each year for the remainder of the century.[2] Silicosis, a disease recognized since antiquity, is still common among miners and foundry workers;[3] a recent review of OSHA inspection records indicates that levels of exposure to silica in 43 per cent of American ferrous foundries remain above legally mandated standards.[4]

Occupational disease encompasses a broad range of human illnesses.[5] It includes lung cancer and mesothelioma in asbestos workers, cancer of the bladder in dye workers, leukemia and lymphoma in workers exposed to benzene, chronic bronchitis in workers exposed to dusts, disorders of the nervous system in workers chronically exposed to solvents, kidney disease in workers exposed to lead, premature senility in workers with chronic exposure to certain neurotoxins, heart disease in workers exposed to carbon monoxide, impairment of reproductive function in men and women exposed to lead and certain solvents, and chronic disease of the musculoskeletal system in workers who suffer repetitive trauma.

Recent data indicate that occupationally related exposures are responsible each year in New York State for 5,000 to 7,000 deaths and for 35,000 new cases of illness (not including work-related injuries).[6] These deaths due to occupational disease include 3,700 deaths from cancer (10% of 37,000 cancer deaths in the state each year), and between 1,000 and 2,800 deaths from pulmonary, cardiovascular, renal, and neurologic diseases (1 to 3% of 95,000 deaths each year from these causes).

Crude national estimates of the burden of occupational disease in the United States may be developed by multiplying the New York State data by a factor of 10. New York State contains slightly less than 10 per cent of the nation's workforce, and it includes a broad mix of employment in the manufacturing, service and agricultural sectors. Thus, it may be calculated that occupational disease is responsible each year in the United States for 50,000 to 70,000 deaths, and for approximately 350,000 new cases of illness. These numbers are distressingly similar to national estimates of 100,000 deaths and 400,000 new cases of work-related illness which were developed more than a decade ago.[7]

The annual costs, direct and indirect, of occupational disease are great. In New York State, these costs are estimated to total at least 600 million dollars per year.[6] Extrapolating these data to the nation, the approximate annual cost of work-related disease (not including injuries) in the United States is calculated to be at least 6 billion dollars.

It is most important as we consider these numbers to remember that occupational diseases are almost entirely preventable. Because occupational diseases arise from man-made conditions, they can be prevented through alteration of those conditions. Unfortunately, the agency principally responsible for the prevention of occupational disease, the U.S. Occupational Safety and Health Administration (OSHA) has largely failed to exercise its legally mandated responsibility. Specifically, OSHA has failed to develop new regulations to regulate occupational exposures, and it has failed to enforce existing regulations. In consequence, many thousands of American working men and women have suffered and are suffering unnecessarily from work-related diseases which are well within the capability of OSHA to have prevented. The costs of medical care in the United States have been substantially and unnecessarily escalated by this failure of stewardship.

Philip J. Landrigan, M.D., M.Sc.

In my testimony this morning, Mr. Chairman, I would like to review with you several examples of OSHA's failure to regulate and failure to enforce.

OSHA'S FAILURE TO REGULATE.

The failure of OSHA to develop adequate regulations to protect working men and women in the United States against toxic occupational exposures is illustrated by review of OSHA's long delay in promulgating two protective standards - the occupational exposure standards for benzene and for formaldehyde.

The Benzene Standard.

Occupational exposure to benzene is well recognized to cause leukemia and aplastic anemia and probably also causes lymphoma.[8] The association between benzene and leukemia was first suggested by medical case reports published more than fifty years ago. Those early observations were corroborated by epidemiologic studies conducted in the 1960's and 1970's among shoe workers, chemical workers and rubber workers.[9] [10] Recently, benzene has been found to be carcinogenic in animal species.[11-14]

In 1978, in order to prevent leukemia in workers exposed to benzene, OSHA promulgated an occupational exposure standard which reduced the permissible exposure level tenfold, from the previously acceptable 8-hour time weighted average (TWA_8) of 10 parts per million (ppm) to 1 ppm.[15] This action was based on the case reports and epidemiologic studies available at that time.[16] Those studies demonstrated statistically significant excess mortality from leukemia in workers exposed to benzene.

On July 2, 1980, in a decision of profound importance for governmental risk management, the U.S. Supreme Court invalidated the OSHA benzene standard of 1 ppm.[17] The Court stated that OSHA had failed to provide substantial evidence of the need for regulation, in that it had not quantified a significant risk of health impairment at an exposure level of 10 ppm and had not established that a new standard would achieve a substantial reduction in risk. As a result of this decision, workers in the United States were allowed to continue to be exposed to benzene at levels up to 10 ppm.

For the purposes of the present hearing, it is important to recognize that by 1981 - one year after the Supreme Court decision - OSHA had sufficient information at hand to effectively reverse the Supreme Court decision. By 1981, OSHA staff members had completed a quantitative assessment of the risk of leukemia associated with occupational exposure to benzene; this material was published in 1982.[18] Another quantitative estimate of the risk of leukemia in persons occupationally exposed to benzene was completed in 1981 by the International Agency for Research on Cancer (IARC); it also was published in 1982. A third risk estimate was made available to OSHA in 1984.[20] Each of these authoritative analyses documented the occurrence of excess leukemia at a benzene exposure level of 10 ppm. Each demonstrated a dose-related risk of leukemia in persons exposed to benzene. Each demonstrated unequivocally that significant reduction in risk would result from reduction in exposure. In short, the analyses presented in these reports would have enabled OSHA easily to meet the tests imposed by the U.S. Supreme Court. Nonetheless, despite a request in 1983 for emergency rulemaking, OSHA issued no rule on benzene until late 1987.[21] At that time, the agency finally reimposed a 1 ppm standard.

In the years which passed between the Supreme Court ruling and the reimposition of the 1 ppm standard for benzene exposure, 9,600 American workers were, according to OSHA's data, exposed to benzene at levels between 1 and 10 ppm, and an additional 370 were exposed at levels greater than 10 ppm.[21] From these data, we have calculated the number of excess leukemia deaths that will ultimately result from exposures to benzene which occurred between 1978 and 1987.[22] In these calculations, we utilized the estimate developed by OSHA[18] that 44 to 152 excess leukemia deaths per 1,000 workers will ultimately result from 45 years' occupational exposure to benzene at 10 ppm, and that shorter and lower exposures will result in proportionately fewer deaths (i.e., that risk is linearly related to cumulative exposure). We calculated on this basis that between 19 and 65 leukemia deaths will eventually result from unnecessarily high exposures to benzene between 1978 and 1987. In addition, deaths from aplastic anemia and lymphoma will add to the toll.

Philip J. Landrigan, M.D., M.Sc.

The Formaldehyde Standard.

Occupational exposure to formaldehyde has long been recognized to cause respiratory irritation and dermatitis. For many years, the OSHA permissible exposure level for formaldehyde was 3 ppm, a standard intended to protect workers against respiratory distress and skin irritation.

More recently, formaldehyde has been found to be carcinogenic. Two animal bioassays, the first of which was published in 1980, have shown that formaldehyde can cause respiratory cancer.[23] [24] In the first of these studies, published by the Chemical Industry Institute for Toxicology (CIIT), a significant increase was seen in the incidence of squamous cell carcinoma of the nasal sinuses in both male and female rats exposed to 14.3 ppm formaldehyde.[28] In the second study, conducted at New York University, ten histologically confirmed, grossly evident, squamous cell carcinomas of the nasal sinuses were observed in rats exposed to formaldehyde; no such tumors were seen in non-exposed control animals.[24] The investigators noted that no grossly visible cancers of the nasal sinuses had been seen in 1,920 control rats examined in the same laboratory over the preceding 14 years.

On the basis of these data, the International Agency for Research on Cancer (IARC) declared in 1982 that "sufficient" or definite evidence exists to consider formaldehyde carcinogenic to animals.[19] IARC cautions routinely that any chemical found to be definitely carcinogenic in animals should be regarded "as though it were" carcinogenic to man.[19]

Despite those clear-cut recommendations and findings, OSHA issued no new exposure standard for formaldehyde until 1987.[26] Thus, nearly eight years elapsed between the first release of data on the carcinogenicity of formaldehyde and promulgation of a new exposure standard. Also, the new standard came approximately six years after OSHA had been petitioned unsuccessfully by a group of labor unions to issue an emergency temporary standard restricting occupational exposure to formaldehyde.

During the gap between the petition for regulation and the promulgation of OSHA's standard, additional epidemiologic data were developed.[24] These data confirm the results of the animal studies. They demonstrate that formaldehyde can cause cancer of the nasal sinuses as well as lung cancer in man. However, this additional certainty was gained at a significant cost to human health. During those eight lost years, 13,000 American workers were exposed to formaldehyde at levels between 1 and 4 ppm.[26] From OSHA's own risk algorithm, it may be calculated that 5,900 cases of respiratory irritation and 10.800 cases of dermatitis resulted annually from this exposure. Additionally, it may be calculated from OSHA's estimates that between 7 and 48 cases of cancer will ultimately develop in these workers as a direct result of their inadequately regulated exposure to formaldehyde.[27]

OSHA'S FAILURE TO ENFORCE.

In recent years, OSHA has substantially reduced its enforcement activities. The number of inspectors has been reduced. The number of inspections has been curtailed. The definition of an inspection has been rewritten, such that many so-called inspections no longer involve actual visits by inspectors to worksites.

To assess the effect of these policy changes on OSHA's enforcement of occupational health regulations, we have reviewed data from OSHA's Management Information System (MIS). This publicly available computer file contains the results of all OSHA field inspections in industries across the United States. We examined OSHA's inspection record for three toxins: asbestos, silica, and inorganic lead.

In the case of asbestos, we found that OSHA had done a reasonable job. In 200 field inspections conducted in New York State in the years 1980 through 1985, OSHA found exposures above the permissible limit in only ten (5%) inspections.

In the case of silica, OSHA conducted 103 inspections in New York State in the years 1980 through 1985. In 41 (40%) of these inspections, OSHA found at least one silica exposure above the permissible exposure limit. Such exposures have been recognized for decades to cause silicosis - a debilitating and irreversible disease of the lungs.[3] Additionally, in four of seven factories which were inspected by OSHA more than once, silica exposure levels above the standard were still present on the second inspection. This finding indicates that OSHA is enjoying little success in forcing industry to obey the law on silica.[4]

In the case of lead, OSHA conducted 170 inspections in New York State in the years 1980 through 1985. Concentrations of lead above the permissible exposure limit were found in 54 (32%) of these inspections. In seven of eight factories in which OSHA conducted repeat inspections, elevated concentrations of lead were still present on the second inspection. This finding indicates that OSHA is having little success in creating respect for the law in the lead industry.

The Pymm Thermometer Case.

A particularly egregious example of OSHA's failure to enforce the law is provided by the case of the Pymm Thermometer Company in Brooklyn, New York.

The Pymm Thermometer Company was one of the nation's largest producers of mercury thermometers. In 1984, following a report from an astute physician in Brooklyn that a worker from Pymm had been seen with symptoms of mercury poisoning, the New York City Department of Health began a medical investigation of the workers at the plant. Over one-half of these employees were found to have urine mercury values indicative of mercury poisoning. A follow-up clinical evaluation was arranged at a nearby city hospital. Although few of these workers had textbook cases of mercury poisoning, they were grossly contaminated with mercury and many had symptoms suggesting that the mercury was adversely affecting their health.

Further probing by the New York City Health Department revealed that OSHA had inspected the Pymm Thermometer Company in 1981 and had cited the firm at that time for violations of the OSH Act for overexposures of workers to mercury. However, that citation was not enforced. Instead OSHA granted the firm a series of extensions.

During the succeeding years, high-level exposure of workers at Pymm continued. Clean-up was minimal. The worst exposure occurred in the plant basement where defective thermometers were broken with a hammer by an unprotected worker to recover liquid mercury. When this room was finally assessed in 1985, the OSHA inspector described it as "nightmarish and unreal." A worker who was employed there for nearly a year appears to have suffered irreversible brain damage.

The disastrous episode at the Pymm Thermometer Company was finally brought under control in 1985 when the New York State Attorney General and the Brooklyn District Attorney brought criminal charges against the owners, charging that they had recklessly and criminally exposed their workers to hazardous substances.

Only after that criminal indictment had been brought did OSHA undertake a definitive evaluation of the plant. At that time, citations were issued which included charges of willful exposure of workers, and over $30,000 in penalties were proposed.

CONCLUSION AND RECOMMENDATIONS.

In conclusion, Mr. Chairman, major shortcomings surround the policies and the activities of the U.S. Occupational Safety and Health Administraton. OSHA has failed to act, it has failed to regulate, it has failed to enforce the law and it has failed to create a climate of respect for the law. In consequence, too many irresponsible businesses, like Pymm Thermometer, have felt free to flaunt the law. They have recklessly overexposed their workers to a wide variey of substances, even to substances whose toxicity has been known for decades. The result has been sickness, disability, and death - all of it preventable, and all of it unnecessary.

These oversight hearings are most welcome. It is clear that continuous Congressional oversight is needed to ensure an effective occupational safety and health program in the federal government. Such oversight is a most effective means of examining OSHA's policies such as their standard setting procedures and enforcement policies. Interestingly, OSHA decided only last month to alter significantly their enforcement progrom and to return to a schedule of more active field inspections.[28] This is welcome news and in all likelihood is not entirely unrelated to this Committee's decision to hold oversight hearings.

In the future, OSHA's programs must be strengthened in four areas:

- Standard setting must be expedited and made more responsive to new scientific findings on workplace hazards. Although OSHA's recent proposal to adopt several hundred updated standards from the American Conference of Governmental Industrial Hygienists (ACGIH) indicates a heartening change in attitude, the ACGIH standards are in many cases less than fully up-to-date and are not adequately documented. Thus, although this renewed rulemaking activity is welcome, a more thoughtful strategy will be required. As a possible interim measure, OSHA may wish to work more closely than it has in recent years with the National Institute for Occupational Safety and Health (NIOSH). NIOSH has developed more than 100 proposed standards in recent years; these standards are, in general, much more thoroughly researched and documented than the ACGIH standards and are much more reflective of current scientific thinking.

- Enforcement must be strengthened and extended. The recent move towards an increased number of field inspections is most welcome and should be continued. Much stricter penalties should be assessed, particularly in the case of repeated and willful violations. In Canada willful violators of occupational exposure standards are fined $100,000 to $200,000 per violation. Application of a similar strategy should be considered in the United States. Also, greater use of criminal sanctions against repeated, willful offenders should be considered.

- OSHA's consultation service should be made more widely available. For many years, this service has been an extremely useful source of advice for businesses across the United States, particularly small businesses. It represents a means by which small businesses may obtain up-to-date information from the government at no cost and with no threat of legal penalties.

- Programs of worker education should be strengthened. Worker training programs have historically been an extremely effective means of disseminating information on occupational health and safety problems to workers across the United States. Expansion of such programs will have a multiplicative effect, far beyond the initial federal investment, in terms of disease prevention.

I will be pleased to answer any questions you may have.

REFERENCES

1. Bailar JC III, Smith EM (1986). Progress Against Cancer? New England J. of Medicine 314:1226-1232.

2. Nicholson WJ (1985). Cancer from Occupational Asbestos Exposure: Projections 1965-2030. In I.J. Selikoff, ed. Disability Compensation for Asbestos-Associated Disease in the United States. New York: Mount Sinai Press.

3. Landrigan PJ et al (1986). Silicosis in a Grey Iron Foundry: The Persistence of an Ancient Disease. Scandinavian J. of Work and Environmental Health 12:32-39.

4. Oudiz J et al (1983). A Report on Silica Exposure Levels in United States Foundries. American Industrial Hygiene Association Journal 44:374-376.

5. W.N. Rom (ed) (1983). Environmental and Occupational Medicine. Boston: Little, Brown and Company.

6. Landrigan PJ, Markowitz SB (1987). Occupational Disease in New York State. Report to the New York State Legislature. New York: Mount Sinai Press.

7. Ashford NA (1976). Crisis in the Workplace: Occupational Disease and Injury. A Report to the Ford Foundation. Cambridge, MA. MIT Press.

8. Rinsky RA, Smith AB, Hornung R, Filloon TG, Young RJ, Landrigan PJ (1987). Benzene and Leukemia - An Epidemiologic Risk Assessment. New England J. Medicine 316:1044-1050.

9. Infante PF, Rinsky RA, Wagoner JK, Young RJ (1977). Leukemia in Benzene Workers. Lancet 2:76-78.

10. Ott GM, Townsend JC, Fishbeck WA, Langner RA (1978). Mortality Among Individuals Occupationally Exposed to Benzene. Arch Environ Health 33:3-10.

11. Maltoni C, Scarnato C (1979). First Experimental Demonstration of the Carcinogenic Effects of Benzene: Long-Term Bioassays on Sprague-Dawley Rats by Oral Administration. Med Lav 70:352-357.

12. Snyder CA, Goldstein BD, Sellumar AR, Bromberg I, Laskin S, Albert RE (1980). The inhalation toxicology of benzene: incidence of hematopoietic neoplasms and hematotoxicity in AKR/J and C57BL/6J mice. Toxicol Appl Pharmacol 54:323-331.

13. Maltoni C, Conti B, Cotti G (1983). Benzene: A Multipotential Carcinogen: Results of long-term bioassays performed at the Bologna Institute of Oncology. Am J Ind Med 4:589-630.

14. NTP Technical Report on the Toxicology and Carcinogenesis Studies of Benzene in F344/N Rats and B6C3F Mice (Gavage Studies) (1986). Research Triangle Park, NC: National Toxicology Program. (NIH Publication No. 86-2545).

15. Occupational Safety and Health Administration (1978). Occupational Exposure to Benzene. Fed. Reg. 43:5918-5970.

16. Occupational Safety and Health Administration (1977). Docket H-059. Benzene. Washington, D.C.: Occupational Safety and Health Administration. Technical Data Center.

17. U.S. Supreme Court. Industrial Union Department vs. American Petroleum Institute, July 2, 1980. (Supreme Court Publication No. 448 US 607.)

18. White MC, Infante PR, Chu KC (1982). A Quantitative Estimate of Leukemia Associated with Occupational Exposure to Benzene. Risk Anal 23:195-204.

19. International Agency for Research on Cancer (1982). IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans: Some Industrial Chemicals and Dyestuffs. Vol. 29. Lyon, France: International Agency for Research on Cancer, pp. 93-148.

20. Crump KS, Allen BC (May 1984). Quantitative Estimates of Risk of Leukemia from Occupational Exposure to Benzene. U.S. Occupational Safety and Health Administration, Docket H-059, Exhibit 152.

21. U.S. Department of Labor (1987). Occupational Exposure to Benzene: Final Rule. Fed. Reg. 52:35560-34578.

22. Nicholson WJ, Landrigan, PJ (1988). Quantitative estimate of the number of lives lost due to delay in the regulation of occupational exposure to benzene. Environmental Health Perspectives, in press.

23. Swenberg JA, Kerns WD, Mitchell RI, Gralla EJ, Paukov KL (1980). Induction of squamous carcinomas of the rat nasal cavity by inhalation exposure to formaldehyde vapor. Cancer Res 40:3398-3402.

24. Albert RE, Sallakumar AR, Laskin S, Kuschner M. Nelson N, Snyder CA (1982). Gaseous formaldehyde and hydrogan chloride induction of nasal cancer in the rat. J Natl Cancer Inst 68:597-603.

25. Blair A, Stewart F, O'Berg M et al (1986). Mortality among industrial workers exposed to formaldehyde. J Natl Cancer Inst 76:1071-1084.

26. Occupational Safety and Health Administration (1987). Occupational Exposure to Formaldehyde: Final Rule. Fed. Reg. 52:46168-46132.

27. Landrigan PJ, Perera FP (1988). Controversy in the regulation of formaldehyde. Amer J Industr Med, in press.

28. New York Times (1988). U.S. Safety inspectors to examine factories, not just injury records, March 23, 1988, p. A18.

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Positions Held:

Professor of Community Medicine and Director, Division of Environmental and Occupational Medicine, Department of Community Medicine, Mount Sinai School of Medicine, 1985 - Present.

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Committees:

American Academy of Pediatrics - Committee on Environmental Hazards, 1976 - present; Chairman, 1983 - 1987.
National Research Council, National Academy of Sciences, Assembly of Life Sciences. Board on Toxicology and Environmental Health Hazards - 1978 - Present; Vice-Chairman - 1981 - Present.
National Research Council, National Academy of Sciences, Assembly of Life Sciences, 1981-1982; Commission on Life Sciences, 1982 - Present.

Committees (continued):

National Research Council, Institute of Medicine, Committee for a Planning Study for an Ongoing Study of Costs of Environment-related Health Effects, 1979 - 1980.
National Research Council, National Academy of Sciences, Assembly of Life Sciences. Panel on the Proposed Air Force Study of Herbicide Orange, 1979 - 1980.
National Research Council, National Academy of Sciences: Committee on the Epidemiology of Air Pollutants, Vice-Chairman, 1984 - 1985.
Governor's Blue Ribbon Committee on the Love Canal, 1978 - 1979.
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World Health Organization. Contributor to the WHO Publication: Guidelines on Studies in Environmental Epidemiology (Environmental Health Criteria, No. 27), 1984.
International Agency for Research on Cancer, Working Groups on Cancer Assessment, October, 1981 and June 1986. (IARC Monographs #29 and #42).
City of Cincinnati, Right-to-Know Ordinance Technical Advisory Committee, 1983 - 1985.
National Institute of Environmental Health Sciences, Third Task Force for Research Planning in the Environmental Health Sciences. Chairman, Subtask Force on Research Strategies for Prevention of and Intervention in Environmentally Produced Disease, 1983 - 1984.
University of Washington: Ruston/Vashon Island Environmental Pathway Study Review Committee, 1984.
Greater Cincinnati Occupational Health Center, Inc.: Board of Directors, 1983 - 1984.
National Institutes of Health, Study Section on Epidemiology and Disease Control, 1986 - present.
Minnesota Department of Health, Range Studies Advisory Committee, 1985.
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(Note: Due to printing limitations, and in the interest of economy, an accompanying report to this statement entitled "Occupational Disease In New York State," February 1987, was retained in the files of the committee.)

QUANTITATIVE ASSESSMENT OF LIVES LOST DUE TO DELAY IN THE REGULATION OF OCCUPATIONAL EXPOSURE TO BENZENE.

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ABSTRACT

Benzene exposure can cause leukemia, aplastic anemia and possibly lymphoma. In 1978, on the basis of strong, but incomplete data then available on the risk of benzene-induced leukemia, the U.S. Occupational Safety and Health Administration (OSHA) reduced the permissible occupational exposure standard for benzene from 10 parts per million (ppm) to 1 ppm. Shortly thereafter, the Fifth Circuit Court of Appeals stayed this ruling and, in 1980, the Supreme Court overturned the regulation, citing insufficient evidence of benefit. Thus, from 1978 until the standard was again lowered to 1 ppm in 1987, American workers were exposed to benzene at levels in excess of 1 ppm. An estimated 9,600 were exposed to levels between 1 and 10 ppm, and an additional 370 were exposed at levels above 10 ppm.

To assess the risk resulting from this delay in regulation, we have conducted an epidemiologic risk analysis. We merged data on numbers of persons (238,000) exposed to benzene in 7 occupational categories with dose-response data from three epidemiologic studies. The range of risk in these studies indicates that 44 to 152 excess leukemia deaths will ultimately result from exposure to benzene at 10 ppm over a working lifetime (45 years), and that lower or briefer exposures will result in proportionately fewer deaths. On this basis, we calculated that between 19 and 65 excess leukemia deaths will ultimately result from occupational exposures to benzene greater than 1 ppm which occurred between 1978 and 1987. Deaths from aplastic anemia and lymphoma will likely add to this toll.

These data confirm the risk of regulatory delay. They suggest that the courts, in reviewing public health regulations, must beware of facile cost-benefit arguments and be willing to accept strong evidence of health risk even when such evidence is incomplete.

INTRODUCTION

Clinical, epidemiologic and toxicologic data indicate that occupational exposure to benzene can cause leukemia. This etiologic association was first suggested by case reports originating more than fifty years ago (1-5). Those observations were corroborated by epidemiologic studies among shoe workers (6), chemical workers and rubber workers (7-11). Recently, benzene has been found to be carcinogenic in animal bioassays (12-16). Benzene was formally declared a human carcinogen by the National Institute for Occupational Safety and Health (NIOSH) in 1976 (17), by the U. S. Environmental Protection Agency (EPA) in 1979 (18), and by the International Agency for Research on Cancer (IARC) in 1982 (19).

The regulatory history of benzene has been turbulent. Particular controversy has surrounded efforts to regulate occupational exposure to benzene at relatively low levels, because until recently only qualitative information was available on the risk of leukemia at low levels of exposure to benzene. In 1978 the Occupational Safety and Health Administration (OSHA) promulgated an occupational exposure standard reducing permissible worker exposures by ten-fold, from the previously acceptable 8-hour time-weighted average (TWA_8) of 10 ppm to 1 ppm (20). This action was based on information from case reports and two epidemiologic studies (21). Both of those studies demonstrated statistically significant excess mortality from leukemia in workers exposed to benzene, but neither presented sufficient data on exposure to permit examination of quantitative dose-response relationships (8,9).

On July 2, 1980, in a decision of profound importance for governmental risk assessment, the U.S. Supreme Court invalidated the OSHA benzene standard of 1 ppm (22). The Court stated that OSHA had failed to provide substantial evidence of the need for regulation, in that it had not quantified a "significant risk of material health impairment" at the previous level of 10 ppm and had not established that a new standard would achieve "a substantial reduction in significant risk." As a result of this decision, workers in the United States were allowed to be exposed at levels up to 10 ppm. That situation persisted until December 1987 when, on the basis of new, highly quantitative epidemiologic and toxicologic data, OSHA reimposed a 1 ppm standard (23).

We have undertaken a quantitative assessment of the number of excess deaths from leukemia which ultimately will result from this ten-year delay in regulation. This analysis merges information developed by OSHA on numbers of workers exposed to benzene at various concentrations in seven industrial categories with quantitative data from epidemiologic studies on risk of benzene-induced leukemia. This analysis provides a basis for reconsideration of the premises underlying the 1980 Supreme Court decision on benzene.

METHODS

Populations Exposed to Benzene

In its final benzene rule, OSHA provided estimates of the number of workers exposed to various concentrations of benzene in the U.S. in seven different occupational categories (23). Overall in 1987, 238,000 workers were occupationally exposed to benzene; approximately 10,000 workers were exposed to time-weighted concentrations in excess of the 1 ppm standard promulgated by OSHA in 1978 (Table 1). Earlier estimates by OSHA had suggested a greater population exposure; the proposed rule (24) had indicated that 274,000 were exposed, 27,500 to concentrations in excess of 1 ppm.

Epidemiologic Risk Assessments.

Between 1982 and 1988, at least seven quantitative risk assessments were published evaluating the risk of leukemia in persons exposed to benzene. IARC (19) estimated that 140-170 excess leukemia deaths would occur per 1,000 workers exposed to benzene for a period of 8.5-years' duration at levels of 10-100 ppm (10) and that 72 excess deaths per 1,000 workers would occur from exposures of the same duration at levels between 1 and 30 ppm (9). Using geometric means to estimate average exposures, these data suggest that 44 to 132 excess deaths from leukemia will occur per 1,000 workers exposed at 10 ppm benzene for a 45-year working lifetime.

OSHA staff members published a risk assessment which estimated that 44 to 152 excess leukemia which deaths will occur per 1,000 workers for the same exposure conditions (25). Another risk assessment commissioned by OSHA for their review of the standard in 1984 indicated the best estimate of risk to be 95 excess leukemia deaths per 1,000 workers at benzene exposures of 10 ppm for a working lifetime (23). This estimate was based on an analysis of data from three exposed populations. A 1979 EPA assessment, although methodologically imprecise, was in approximate agreement with the above analyses (18).

Those risk assessments used slightly different methodologies and considered different models for the dose- and time-course of benzene-related leukemias. Nevertheless, the results were in remarkable agreement. The results of all of the analyses fall within the range of the OSHA estimate of 44 to 152 excess leukemia deaths per 1,000 workers exposed to benzene for 45 years at concentrations of 10 ppm. All of the above analyses were based upon estimates of group exposure.

More recently, research has been published on the risk of leukemia related to the benzene exposures of individual subjects (11). The results indicate, that the above assessments based on group exposure may actually underestimate the risk of benzene-induced leukemia. Table 2, from Rinsky et al., shows observed and expected deaths from leukemia according to cumulative individual exposure. A weighted least squares regression line through an SMR of 100 at zero exposure yields the relationship,

$$\text{SMR} = 100 + 0.035 \times \text{ppm}.$$

The standard error on the coefficient of cumulative exposure in this equation is 0.024 to 0.045.

We have estimated the excess leukemia mortality from this exposure-response relationship using a life-table analysis, with the risk lagged by five years. The results for a 45-year exposure, beginning at age 25, suggest that 71 to 132 of 1,000 workers initially exposed to benzene at 10 ppm will die of benzene-related leukemia ~~(CL:71-132~~). A dose-response relationship determined from a case-control analysis of the data from this study suggests an even higher mortality.

An analysis by Crump and Allen (26), which utilized the same data base as that used by Rinsky et al. (11), and which employed a relative risk model, found an excess risk of death from leukemia of 72 per 1,000 workers exposed to 10 ppm for a 45-year working lifetime.

An additional analysis of the data of Rinsky et al. was undertaken by Austin et al. (27) utilizing the risk assessment methodology proposed by Enterline et al. (28). This analysis estimated that 125 excess leukemia deaths could result per 1,000 workers exposed for a 45-years' working lifetime to 10 ppm benzene. A further analysis by Austin et al., based on the Dow Chemical Company cohort (9), found that 69 excess leukemia deaths would result per 1,000 workers exposed over a 45-year working lifetime to 10 ppm benzene.

RESULTS

From these risk assessments, we have estimated the number of lives of American workers that ultimately will be lost because of exposure to unnecessarily high concentrations of benzene between 1978 and 1987. We used data on the sizes of the exposed population from Table 1. We utilized the estimate from OSHA (25) that 44 to 152 excess leukemia deaths per 1000 workers will result from 45 years' occupational exposure to benzene at 10 ppm, and that shorter and lower exposures will result in proportionally fewer deaths (i.e. that risk is linearly related to cumulative exposure). We calculate, on the basis of those estimates, that 19 to 65 premature leukemia deaths will eventually be caused by benzene exposures in excess of 1 ppm that took place between February 1978 and September 1987. In addition to the leukemia deaths, deaths from aplastic anemia and lymphomas will likely add to this toll. If, on the other hand, the earlier population exposure estimates of OSHA (24) are utilized, the excess leukemia death toll will range from 117 to 402. If one uses the dose-response relationship of Rinsky et al. and the population estimates of Table 1, depending on assumptions made about exposures prior to 1978, the number of excess deaths will range from 83 to 1126.

It is not certain which of these estimates is correct. The lowest is very likely an underestimate, because the population estimated in the OSHA final rule were derived principally from exposure concentrations measured after 1985; higher exposure values would likely have existed in earlier years. The highest estimate may be an overestimate, because of uncertainties in the dose-response relationship (stemming from the small of cases), particularly ~~of~~ at high levels of exposure.

DISCUSSION

The data presented in this analysis show that a court-imposed ten-year delay in the regulation of occupational exposure to benzene resulted in substantial unnecessary excess mortality from leukemia (29). The U. S. Supreme Court, in its 1980 ruling, established a new criterion that must henceforth be met by OSHA in the promulgation of workplace health standards, namely, that a "significant" risk must be shown to exist under present conditions and that this risk will be significantly reduced by a new standard. This approach to regulation breaks precedent with long-standing tradition in public health. The tradition urges in the interest of disease prevention that public health regulations be set early, even on the basis of incomplete evidence. That approach embodies a conscious decision to err on the side of prevention in regulatory decision making (30). In the decade of regulatory inaction which followed the Supreme Court decision, additional epidemiologic and toxicologic data were developed on benzene. These data confirmed and strengthened the results of earlier analyses and documented the existence of exposure-related risk. However, as we have shown, this additional certainty was gained at a cost (31).

Importantly, the Supreme Court did not require that OSHA conduct a cost-benefit analysis, the basis on which the Fifth Circuit Court of Appeals initially vacated the 1978 standard. Also the Supreme Court provided some guidance as to what might constitute a "significant health risk", suggesting that a risk of 1 death per 1000 from regular exposure might well qualify. The residual risk from a 45-year exposure to 1 ppm of benzene vapor is estimated to range from 4 to 15 deaths per 1000 exposed.

While OSHA has finally made progress in reducing what was clearly a significant risk in the case of benzene, several aspects of the Supreme Court decision continue to have disturbing ramifications. Firstly, this decision implies that less than significant risks need not be regulated, even though such regulation might be economically feasible and of public health benefit. Secondly, individual risk was the only criterion listed for consideration; no mention was made of considering the number of individuals exposed to a given risk. Is a risk to 500 workers to be considered the same as a risk to 5 million workers in terms of significance? Finally, the Supreme Court decision may turn future regulatory hearings into forums arguing such nebulous questions as what risk is "significant" or what benefit is "substantial", rather than focusing on such basic scientific issues as identification of health effects, definition of dose-response relationships and design of control measures.

REFERENCES

1. Delore, P., and Borgomano, C. Leucemie aigue au cours de l'intoxication benzenique: sur l'origine toxique de certaines leucemies aigues et leurs relations avec les anemies graves. J. Med. Lyon 9:227-233, 1928.

2. Mallory, T. B., Gall, E. A., and Brickley, W. J. Chronic exposure to benzene (benzol). III. The pathologic results. J. Ind. Hyg. Toxicol. 21:355-377, 1939.

3. Browning, E. Toxicity and Metabolism of Industrial Solvents. New York: Elsevier Press, 1965. pp. 3-65.

4. Cavigneau, L. Les intoxications confirmees. Cah. Med. Interprof. 2:298-336, 1965.

5. Vigliani, E. C., and Saita, G. Benzene and leukemia. New Engl. J. Med. 271:872-876, 1964.

6. Aksoy, M., Erdem, S., and DinCol, G. Leukemia in shoe-workers exposed chronically to benzene. Blood 44:837-841, 1974.

7. Vigliani, E. C. Leukemia associated with benzene exposure. Ann. N. Y. Acad. Sci. 271:143-151, 1976.

8. Infante, P. F., Rinsky, R. A., Wagoner, J. K., and Young, R. J. Leukemia in benzene workers. Lancet 2:76-78, 1977.

9. Ott, G. M., Townsend, J. C., Fishbeck, W. A., and Langner, R. A. Mortality among individuals occupationally exposed to benzene. Arch. Environ. Health 33:3-10, 1978.

10. Rinsky, R. A., Young, R. J., and Smith, J. B. Leukemia in benzene workers. Am. J. Ind. Med. 2: 217-245, 1981.

11. Rinsky, R. A., Smith, A. B., Hornung, R., Filloon, T.G., Young, R. J., and Landrigan, P. J. Benzene and leukemia - an epidemiologic risk assessment. New Engl. J. Med. 316:1044-1050, 1987.

12. Goldstein, B. D. Benzene toxicity: a review of recent literature. Piscataway, N.,J.: Department of Environmental and Community Medicine and Dentistry of New Jersey-Rutgers Medical School, 1983.

13. Maltoni, C., and Scarnato, C. First experimental demonstration of the carcinogenic effects of benzene: long-term bioassays on Sprague-Dawley rats by oral administration. Med. Lav. 70:352-357, 1979.

14. Snyder, C. A., Goldstein, B. D., Sellumar, A. R., Bromberg, I., Laskin, S., and Albert, R. E. The inhalation toxicology of benzene: incidence of

hematopoietic neoplasms and hematoxicity in AKR/J and C57DBL/6J mice. Toxicol. Appl. Pharmacol. 54:323-331, 1980.

15. Maltoni, C., Conti, B., and Cotti, G. Benzene: a multipotential carcinogen: results of long-term bioassays performed at the Bologna Institute of Oncology. Am. J. Ind. Med. 4:589-630, 1983.

16. NTP technical report on the toxicology and carcinogenesis studies of benzene in F344/N rats and B6C3F, mice (gavage studies), Research Triangle Park, N.C.:National Toxicology Program, 1986. (NIH publication no. 86-2545.)

17. National Institute for Occupational Safety and Health. NIOSH revised recommendation for an occupational exposure standard for benzene. Cincinnati, Ohio: National Institute for Occupational Safety and Health, 1976. (DHEW publication no. (NIOSH) 76-76-137-A.)

18. Albert, R. E. Carcinogen assessment group's final report on population risk to ambient benzene exposures. Research Triangle Park, N.C.; United States Environmental Protection Agency, 1979. (EPA-450/5-890-004.)

19. International Agency for Research on Cancer. IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans: Some Industrial Chemicals and Dyestuffs. Vol. 29. Lyon, France: International Agency for Research on Cancer, 1982. pp. 93-148.

20. Occupational Safety and Health Administration. Occupational exposure to benzene. Federal Register. 43:5918-5970, February 10, 1978.

21. Occupational Safety and Health Administration. Docket H-059. Benzene. Washington, D.C.: Occupational Safety and Health Administration. Technical Data Center, 1977.

22. U.S. Supreme Court. Industrial Union Department vs. American Petroleum Institute, July 2, 1980. (Supreme Court publication no. 448 US 607.)

23. U.S. Department of Labor. Occupational exposure to benzene; final rule. Federal Register, 52:34460-34578, September 11, 1987.

24. U.S. Department of Labor. Occupational exposure to benzene; proposed rule and notice of hearing. Federal Register 50:50512-50586, December 10, 1987.

25. White, M. C., Infante, P. R., and Chu, K. C. A quantitative estimate of leukemia mortality associated with occupational exposure to benzene. Risk Anal. 23:195-204, 1982.

26. Crump, K. S., and Allen, B. C. Quantitative Estimates of Risk of leukemia from exceptional exposure to benzene. U.S. Occupational Safety and Health Administration, docket H-059, exhibit 152, May 1984.

27. Austin, H., Delzell, E., and Cole, P. Benzene and leukemia: a review of the literature and a risk assessment. Amer J. Epidemiol. 127:419-439, 1988.

28. Enterline, P. E. Lifetime risks of kidney cancer caused by gasoline extracted from animal and human students. Prepared for Motor Vehicle Manufacturers Association of the United States, November 30, 1984.

29. Landrigan, P. J. Benzene and Luekemia. Am. J. Ind. Med. 8: 605-606, 1987.

30. Robin, J. M., Landrigan, P. J., Robin, T. G., and Fine, L. J. Decision making under uncertainty in the setting of environmental health regulations. J. Public Health Policy 3: 322-328, 1985.

31. Ashford, N. A. New scientific evidence and public health imperatives. New Engl. J. Med. 316: 1088-1085, 1987.

TABLE 1

Number of workers exposed to benzene and current exposure levels (by industry divisions).

	Percent of observations in each exposure category by 8-hour time weighted average (TWA) benzene concentrations (ppm)						
	0.0-0.1	0.11-0.5	0.51-1.0	1.1-5.0	5.1-10	10+	Total numberof workers
Petrochemical plants	-	3,208	-	989	103	0	4,300
Petroleum refineries	30,715	12,410	2,187	1,807	238	190	47,547
Coke and coal chemicals	0.0	37.2	26.1	26.0	4.2	1.2	947
Tire manufacturers	34,710	24,375	4,095	1,820	-	-	65,000
Bulk terminals	15,661	8,887	1,436	1003	8.1	2.7	27,095
Bulk plants	26,197	14,866	2,402	1,677	136	4.5	45,323
Transportation via tank truck	32,558	10,996	2,523	1,380	4.8	9.5	47,600
Totals	139,841	75,113	12,904	8,936	647	370	237,812

U.S. OSHA Occupational Exposure to Benzene.
Final Rule 29 CFR Part 1910, FR 34460-34578,
September 11, 1987.

TABLE 2

Observed and expected deaths from leukemia in rubber workers exposed to benzene between 1940 and 1965 by cumulative exposure and years of latency.

Latency (yr)	Exposure (ppm-yr)				
	0.001-40	40-200	200-400	>400	Totals*
		observed/expected deaths			
<5	2/0.10	0/0.02	-	-	2/0.12
5-10	0/0.16	0/0.05	0/0.01	-	0/0.22
10-15	0/0.22	1/0.07	1/0.02	0/0.00	2/0.31
15-20	0/0.27	1/0.09	1/0.03	2/0.01	3/0.39
20-25	0/0.32	0/0.10	0/0.03	1/0.01	1/0.46
25-30	0/0.37	0/0.12	0/0.04	0/0.01	0/0.54
>30	0/0.40	0/0.16	1/0.04	0/0.01	1/0.62
Totals*	2/1.83	2/0.62	2/0.17	3/0.04	9/2.66
Standardized mortality ratio	109	322	1,186	6,637	337
Confidence interval	12-394	36-1,165	133-4,285	1,334-19,393	154-641

*The numbers of expected deaths have been rounded.

From Rinsky et al. (11).

The **Chairman**. Mr. Moran.

Mr. **Moran**. Mr. Chairman, thank you for the opportunity to offer my comments during this important oversight hearing on the Occupational Safety and Health Act.

I am John B. Moran, past Director of the Division of Safety Research with NIOSH.

What is the burden of occupational trauma in our Nation?

There are several. First, the human toll. While much has been made of the apparent decline in total injuries in the workplace in the 1980s, the fact is that the rate of injuries severe enough to require a worker to miss work has increased, and the number of days lost from work per 100 workers for such injuries has increased.

In 1985, at least 5.4 million workers were injured on the job in this country; 2.5 million of these workers suffered trauma on the job severe enough to cause them to lose time from work.

These severe injuries, as a percent of all reported injuries, represent 46 percent of all of the injuries—a percentage which is likewise increasing, and in 1985, resulted in over 45 million days lost from work.

Deaths due to occupational trauma exceed 7,000 per year based on the first census on such fatalities ever published in the United States. Deaths are also increasing. And, as Mr. Frumin noted earlier, many are not being reported to OSHA.

Cost: Injuries at work are estimated to cost the Nation $35 billion per year, according to the National Safety Council. However, a recent estimate by a major insurance company executive at an injury workshop held in Atlanta last year stated that workmen's compensation claims represent about $60 billion per year. Occupational Trauma accounts for $58 billion of this total. Areas of greatest loss are back injuries, slips and falls injuries, and motor vehicle injuries, in that order.

On the other side of the cost coin, our Nation spent about $1.66 billion in 1983 on cancer and heart disease research. The Federal expenditure for all trauma research was about $112 million of which less than $5 million went to occupational trauma research, which is an investment of about a nickel per worker per year.

Our international image suffers: The Minority Report of the House Labor Committee representatives on H.R. 16785 in 1970—which eventually became the Occupational Safety and Health Act—expressed the view that the United States had the best occupational safety and health performance record in the world, and therefore there was no need for the Act.

Yet, overall accidental death rates reported by the National Safety Council ranked 36 countries. The U.S. ranked 20th. An International Labor Organization report issued in 1987 contained reported data on construction fatalities in seven countries. The U.S. rate, the poorest of the seven, was 39 per 100,000 workers.

The **Chairman**. Do they use the same method for calculating those figures?

Mr. **Moran**. Yes, sir. There was data for many more countries, but I used the data for the seven countries that actually gave the number of fatalities and the number of workers in construction, so a very simple and direct calculation could be made. I made no statistical assumptions.

The United Kingdom, New Zealand, Greece and Finland ranged from 15 to 18. Ontario, Canada has had a rate of 9.5 to 11.8 over the 1982–1985 period.

While reporting definitions and a number of other factors make precise comparisons of such numbers difficult, gross comparisons seem to be in order considering that the differences are magnitudes of 3 or 4.

Preventability: Over the past few years, a special fatality investigation program has been conducted by NIOSH, involving in-depth investigations of 204 fatal events, resulting in 237 workers' lives lost. None of these fatalities were unpredictable events, and all were preventable.

OSHA failures: Standards: Confined spaces result in the death of about 300 workers every year in this country, almost half of which are would-be rescuers. The OSHA Safety Directorate has been attempting to publish a proposed confined space standard since 1980, as no standard now exists.

The proposed standard has never left the Department. In the intervening period, well over 2,000 workers have died.

In an attempt to bridge the regulatory gap, NIOSH has widely disseminated it's criteria document developed in 1980, a safety alert, and a guide. Well over 100,000 copies of the guide were requested in just the first three-month period following printing.

In addition, a public service announcement featuring Ralph Macchio, better known as "The Karate Kid", was proposed by NIOSH to further highlight this problem. While the famous actor was contributing his time free-of-charge, the $30,000 total cost was deemed unacceptable to the Department of Health and Human Services, and we were not permitted to proceed with production.

A lockout/tagout proposed standard continues to languish, despite the fact that a unique intervention effectiveness study, conducted between NIOSH and the Industrial Commission of Ohio, demonstrated clear and unequivocal benefit to such a standard from the point of view of trauma prevention. In addition, such prevention measures are widely used by almost every major company in the United States.

A proposed standard for oil and gas well-drilling was returned by OMB for major revision subsequent to huge cost estimates by the industry. It was revised, yet has still not been acted upon within the Department of Labor. This, in spite of the fact that this industry is particularly hazardous, accounting for 5 percent of all fatalities reported by BLS, including 17 percent of all fire-related deaths and 12 percent of all gas inhalation deaths in the workplace.

OSHA recently proposed revisions to the existing Construction Excavation Standards. Yet my analysis of occupational fatality reports from both OSHA and NIOSH suggest that well over 90 percent of recent excavation fatalities occurred as a result of failure to comply with the existing standard. The resources used to prepare the revisions to the standard would have saved lives if applied to enforcement of the existing standard.

The issue of enforcement has already been well-covered by previous people, so I will skip down to another issue within enforcement, which is the fact that targeting inspections based upon employer-maintained records not only invites under-reporting, but insures that OSHA inspectors are unable to enforce many simple interventions, such as personal protective equipment use.

A wide range of generally adequate protective equipment is available, yet on the basis of the excellent work injury reports conducted by the Bureau of Labor Statistics, which are surveys of workers who have suffered compensable injuries, a vast majority of these workers were not wearing protective equipment that would have protected them from the compensable injury they received.

As an example, 91 percent of those workers suffering injuries due to falls were wearing no fall protection. Of the 9 percent who were, 81 percent of those did not have the fall protection secured, so it was useless.

OSHA has in this decade accepted a number of impediments to reducing the Nation's trauma toll. First of all, poor data. The Bureau of Labor Statistics, State workmen's compensation organizations, the National Safety Council, the National Center for Health Statistics, NIOSH, and many others have data relevant to the occupational setting. None are comparable. Few are useful for research targeting or priority-setting. None provide the detailed information necessary in today's OSHA standard setting environment.

The 1987 report entitled, "Counting Injuries and Illnesses in the Workplace", by the National Research Council merits very serious consideration as a step toward resolving this unacceptable situation. We desperately need to improve our surveillance information so that our Nation's scarce resources can better be targeted toward the resolution of major problems.

Paperwork Reduction Act requirements have been implemented by establishing burden-hour limits for each department or agency. As a consequence, OSHA safety standards may no longer contain required medical examinations, posting or permitting requirements for confined spaces or the lockout/tagout standard, or training programs for hazardous operations due to the burden-hours associated with those known effective prevention measures.

To promulgate needed safety standards which are artificially limited in this way is inappropriate and counterproductive. While the intent of Congress in this Act is laudable, I cannot imagine that this consequence was anticipated.

Cost benefit analysis, otherwise referred to as regulatory impact analysis required by executive order: Cost benefit analysis sufficient to meet Department of Labor and OMB requirements demands excellent surveillance information. Such rarely exists. As a consequence, standards are proposed to cover only those areas or industries where extensive information is available.

This does not infer that other industrial sectors do not have the same problem, only that the data are insufficient to provide the basis for proving benefit.

Therefore, cost benefit analysis as presently applied in the face of poor surveillance data inappropriately biases and controls the standard setting process.

Trauma and safety standard violations: OSHA is charged with the responsibility of establishing and enforcing occupational safety and health regulations. NIOSH is charged primarily with the conduct of research and, based thereon, recommending new or revised standards to OSHA.

NIOSH's earlier efforts in this area generated over 100 criteria documents of which OSHA has responded with health or safety standards to but a few.

Workmen's compensation claims, on the other hand, have been filed predominantly as a result of trauma—over 95 percent. While I am not aware of any report addressing this issue, a cursory examination of the trauma compensation claim data suggests that perhaps 50 percent of such trauma may not involve direct safety standards violations.

For example, 42 percent of such claim dollar costs are for acute or chronic back trauma, for which there is no clear standard today. A more comprehensive analysis of this issue may have merit with a view toward establishing those areas within the trauma problem where OSHA can and should be held accountable and establishing those clearly non-safety standard areas which require further research, regulatory and/or consultive emphasis.

In conclusion, the vast majority of occupational acute trauma is preventable, and we know how to do it. The safety standards promulgation efforts of OSHA in the 1980's have been far less than satisfactory. The American worker is coming out last in this process. Safety enforcement, thirdly, has been conducted on an inappropriate basis, and is even declining.

I have a number of recommendations in my prepared comments, but I would only choose to address one of them. That is, that I would recommend that the Congress establish a mandatory, nonnegotiable fine of $100,000 for every acute occupational fatality involving violation of a standard.

Our friends in Ontario, Canada, the Deputy Minister of Labor at an international conference which I chaired last October, stated that their fine was $100,000 for such occurrences and for willful violations. They felt that was considered in Ontario, by industry, only as a cost of doing business. They are proposing to raise their fines to a quarter of a million dollars.

The fines we have today of a maximum of $10,000 are simply inadequate.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Moran. Very fine.

[The prepared statement of Mr. Moran follows:]

Statement of

John B. Moran

Before the
Committee on Labor and Human Resources
United States Senate

Washington, D.C.
April 18, 1988

John B. Moran

Mr. Chairman and members of the Committee. Thank you for the opportunity to offer my comments during this important oversite hearing on the Occupational Safety and Health Act. I am John B. Moran past Director of the Division of Safety Research NIOSH; a consultant to industry and government on occupational safety; a previous appointed member of both the Mine Health Research Advisory Committee and the Advisory Committee on Construction Safety and Health; and the past-President of an International occupational respiratory protection technical society. I am appearing today as a private citizen.

THE BURDEN OF OCCUPATIONAL TRAUMA TO OUR NATION

Human Toll

While much has been made of the apparent decline in total injuries in the workplace in the 1980's, the fact is that the rate of injuries severe enough to require a worker to miss work has INCREASED, and the number of days lost from work per 100 workers for such injuries has INCREASED. In 1985, at least 5.4 million workers were injured. 2.5 million workers suffered trauma on the job severe enough to cause lost time from work. These severe injuries represent 46% of all work-related trauma and illness cases reported, a percentage which is increasing and resulted in over 45 million days lost from work in 1985 (1). Deaths due to occupational trauma exceed 7,000 per year based upon the first census on such facilities ever published in the US (2). Deaths are also INCREASING.

Cost

Injuries at work are estimated to cost the Nation $35 Billion annually (3). A recent estimate by a major insurance company executive, however, was that workmens compensation claims represent about $60 Billion annually. Trauma accounted for $58 Billion. Areas of greatest loss were back injuries, slips and falls injuries, and motor vehicle injuries; in that order. (4)

Our Nation spent about $1.666 Billion in 1983 on Cancer and Heart Disease Research. The Federal expendature for trauma research was only $112 Million of which less than $5 Million went to occupational trauma research, which is ~~equivalent~~ [illegible] to about a nickel per worker per year. (5)

International Image

The minority report of the House Labor Committee representatives on HR 16785 in 1970, expressed the view that the US had the best occupational safety and health performance record in the world. Overall accidental death rates reported by the National Safety Council (3) ranked 36 countries. The US ranked 20th. An International Labour Organization (ILO) report [illegible] (6) contained reported data on Construction fatalities in seven countries. The US rate, the poorest of the seven, was 39 per 100,000 workers. The U.K., New Zealand, Greece, and Finland ranged from 15 to 18. Ontario, Canada has had a rate of 9.5 to 11.8 over the 1982-1985 period. While reporting definitions and a number of other factors make precise comparisons of such numbers difficult, gross comparisons seem to be in order considering that the differences are magnitudes of 3 or 4.

Preventability

Over the past few years, a special fatality investigation program has been conducted by NIOSH involving in-depth investigations of 204 fatal events resulting in 237 workers' lives lost. None of these fatalities were unpredictable events, and ALL WERE PREVENTABLE.

OSHA Failures·

Standards,

Confined Spaces result in the death of about 300 workers every year in this country, many of which are would-be rescuers. The OSHA Safety Directorate has been attempting to publish a proposed Confined Space Standard since 1980; and NO Standard now exists. The proposed standard has never left the Department ~~of Labor~~. In the intervening period, over 2000 workers have died. In an attempt to bridge the regulatory gap, NIOSH has widely disseminated its Criteria Document, a Safety Alert, and a Guide. Well over 100,000 copies of the Guide were requested in the first three-month period following printing. In addition, a Public Service announcement featuring Ralph Macchio better known as "The Karate Kid" was proposed by NIOSH. While the famous actor was contributing his time free of charge, the $30,000 cost was deemed unacceptable as the DHHS would not clear the announcement for production.

A Lock Out-Tag Out proposed Standard continues to languish despite the fact that a unique intervention effectiveness study conducted between NIOSH and the Industrial Commission of Ohio demonstrated clear and unequivocal benefit and is a prevention practice used by nearly every major company.

A proposed standard for Oil and Gas Welldrilling was returned by OMB for major revision subsequent to huge cost estimates by the industry, was revised, yet has still not been acted upon within DOL. This in spite of the fact that this industry in particularly hazardous accounting for 5% of all fatalities reported by BLS (1) for SIC 1300 including 17% of all fire-related occupational fatalities and 12% of all gas inhilation fatalities.

OSHA recently proposed revisions to the existing Construction Excavation Standards. Yet, my analysis of occupational fatality reports from both OSHA and the NIOSH fatality investigative effort suggest that over 90% of recent excavation fatalities occured as a result of failure to comply with the EXISTING STANDARD. The resources used to prepare the revisions to the standard would have saved lives if applied to enforcement of the existing standard.

Enforcement

In the period 1973 to 1983, the percentage of OSHA inspections devoted to Safety have DECLINED and the number of workers covered by such inspections has DECREASED BY NEARLY 50% (7).

In 1983, the average OSHA fine per violation was $257.00 and $179.00 per inspection (7). The media is replete with reports of OSHA fines of $2000.00 or less for incidents resulting in fatalities which is prior to negotiation and fine reduction. To the private sector, this is a very low cost of doing business, and serves as no deterent what-so-ever.

Targeting inspections based upon employer maintained records, not only invites under reporting, but insures that OSHA inspectors are unable to enforce many simple interventions such as personal protective equipment use. A wide range of generally adequate personal protective equipment is available to employers and employees to provide protection against recognized hazards in the workplace. Yet, on the basis of the excellent Work Injury Reports (WIR's) by the BLS, which are surveys of workers suffering compensable injuries, a vast majority of such injured workers were not utilizing personal protective equipment. Perhaps 20% of compensable injuries could be eliminated or reduced literally over-night if such available equipment were utilized. The high percentage of non-use suggests that this particular area is not one of OSHA enforcement activity.

ACCEPTED IMPEDIMENTS:

Poor Data

The Bureau of Labor Statistics, State Workmen's Compensation organizations, the National Safety Council, the National Center for Health Statistics, NIOSH, and others have data relevant to the occupational setting. NONE ARE COMPARABLE. Few are useful for research targeting or priority-setting. NONE provide the detailed information necessary in today's OSHA standard setting environment. The 1987 report entitled, "Counting Injuries and Illnesses in the Workplace" by the National Research Council merits very serious consideration as a step toward resolving this unacceptable situation. We desperately need to improve our surveillance information so that our Nation's scarce resources can better be targeted toward the resolution of major problems.

Paperwork Reduction Act

Paperwork Reduction Act requirements have been implemented by establishing limits of paperwork in burden hours. As a consequence, OSHA safety standards might no longer require medical exams, posting or permitting of Confined Spaces, or training programs for hazardous operations due to the burden hours associated with those activities. To promulgate needed safety standards which are artifically limited in this way is inappropriate and counterproductive. While the intent of Congress in this Act is laudable, I can not imagine that this consequence was anticipated.

Cost Benefit Analysis.

Cost-Benefit analysis sufficient to meet DOL and OMB requirements demands excellent surveillance information. Such rarely exists. As a consequence, standards are proposed to cover only those area or industries where extensive information is available. This does not infer that other industrial sectors do not have the same problem, only that the data are insufficient to prove benefit. Therefore, cost benefit analysis as presently applied in the face of poor surveillance data inappropriately biases and controls the standard setting process.

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OSHA is charged with the responsibility of establishing and enforcing occupational safety and health regulations. NIOSH is charged, primarily, with the conduct of research and based thereon, recommending new or revised standards to OSHA. NIOSH's earlier efforts in this area generated over 100 Criteria Documents of which OSHA has responded with health or safety standards to but a few.

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CONCLUSIONS:

1. The vast majority of occupational acute trauma is PREVENTABLE.
2. The safety standards promulgation efforts of OSHA in the 80's has been far less than satisfactory. The American worker is coming in LAST in this process.
3. Safety enforcement has been conducted on an inappropriate basis and is even declining.

RECOMMENDATIONS:

1. Establish a mandatory, non-negotiable fine of $100,000 for every acute occupational fatality involving violation of a standard.
2. Implement, as a start to an improved research and regulatory basis, the recommendations in the NRC report "Counting Injuries and Illnesses in the Workplace".

3. Exempt occupational safety and health standards from the requirements of the Paperwork Reduction Act, at least to some defined extent.
4. OSHA should not rely on employers maintained records to target inspections.
5. Increase attention to enforcement of simple preventive measures such as personal protective equipment.

This concludes my prepared remarks. I would be happy to attempt to answer any questions which you might have.

John B. Moran

References:

1. Department of Labor, Bureau of Labor Statistics. Bulletin 2278. Washington, D.C., May, 1987

2. National Traumatic Occupational Fatalities; 1980-1984. NIOSH, DSR. June 11, 1987

3. National Safety Council. Accident Facts. 1987 Edition. Chicago, Illinois

4. Public Health Reports. Vol. 102, No. 6, Nov.- Dec. 1987 pg. 665

5. Injury in America. National Academy Press, Washington, DC 1985

6. International Labour Organization, Report V (1) 73rd Session. Geneva, 1987

7. Preventing Illness and Injury in the Workplace. OTA-H-256. Office of Technolgy Assessment, Washington, D.C. April, 1985

The CHAIRMAN. Dr. Pollack.

Dr. POLLACK. Mr. Chairman, I am Earl Pollack, and am currently a member of the research staff of the Biostatistics Center at George Washington University.

I am testifying because of my role as Study Director for a study on the national statistics on occupational injuries and illnesses carried out by a panel under the Committee on National Statistics of the National Academy of Sciences. The panel itself was chaired by Dr. Seymour Geisser, Head of the School of Statistics, University of Minnesota. A list of panel members and a summary of the report are attached.

In 1984, because of concerns of possible under-reporting of workplace injuries arising in part from an OSHA policy that exempted employers from routine safety inspections on the basis of their injury records—you have heard a lot about this this afternoon—Congress appropriated funds in OSHA's budget earmarked for the Bureau of Labor Statistics to assess the quality of its annual survey on occupational injuries and illnesses.

In response to this directive, the Bureau of Labor Statistics requested the Committee on National Statistics to convene a panel of experts to address the key issues related to the collection of data on workplace injuries and illnesses.

The study was completed last fall and published in October 1987. I will summarize briefly the conclusions and some of the recommendations of the panel, particularly those that pertain to OSHA.

In my testimony, I will be primarily presenting the views of the panel, but I also include some opinions of my own that are not necessarily those of the panel or the Committee on National Statistics, or the National Research Council.

First, let me give a very brief background that indicates the nature of the national program of statistics on occupational injuries and illnesses. This program resides in the Bureau of Labor Statistics, but the funds for its operation come from OSHA's budget. My remarks will be confined primarily to the Annual Survey on Occupational Injuries and Illnesses of the Bureau of Labor Statistics, which is the major source of the statistics.

The Annual Survey is a probability sample of the five million private sector establishments in the United States. Approximately 280,000 establishments are included in the sample each year. Each employer, whether included in the sample or not, is required by OSHA to keep a log of all injuries and illnesses occurring in the workplace on a form known as the OSHA 200. The Annual Survey collects a summary of a small part of this form from those establishments included in the sample. The survey then forms the basis for the assessment of trends in rates of workplace injuries, illnesses and fatalities.

In investigating the adequacy and quality of this system, the panel arrived at six major conclusions. These statements are short, so I will simply read them as quoted from the report.

First, "The BLS data systems, in their current form, are inadequate to provide OSHA with the data it needs for maintaining an effective program for the prevention of workplace injuries and illnesses." The basic problem here that the panel found was that the data actually collected in the Annual Survey represent only a small part of that recorded and thus do not provide enough detail to be useful for most purposes.

Second, "OSHA has not demonstrated an ability to use the data it has available to it, nor does it seem to recognize the need for data to manage its programs." And to quote from the report:

> The panel conducted a number of interviews with key OSHA personnel and came away with a concern that the agency has little understanding of the need for data and how data might be used effectively to manage its program. Even though OSHA maintains its own Integrated Management Information System, it is based only on information obtained as a result of its inspections. Thus, it can provide counts of the number of inspections conducted, the number of citations made, the size of the penalties assessed, and so on, but it does not contain systematic information on important aspects of the program such as the fatalities reported to OSHA that were not investigated, laboratory reports on exposure sampling for which OSHA did not issue citations, reports of laboratory findings from employers based on mandatory sampling, and other similar kinds of information. OSHA does not seem to have a clear understanding of the kinds of questions for which it needs quantitative information.

Third, "Even if the current BLS data systems are modified, they would be unable to measure the rate of occurrence of occupational illnesses." The basic problem here is that many of the occupational illnesses have long latent periods, and thus it is extremely difficult to connect the possible exposure in a given establishment to a disease outcome that may occur several years later.

Fourth, "No adequate evaluation of the extent of under-reporting or over-reporting of occupational injuries has been conducted." Some studies have been attempted but never completed because of the difficulty in conducting them and because of insufficient funds.

Fifth, "Only a small portion of the information that employers are required to record on occupational injuries and illnesses is actually collected." I referred to this problem earlier.

Sixth, "There is no single agreed-upon estimate of the number of occupational fatalities in the United States." The panel found that for 1984, for example, these estimates ranged from 3,740 based on the BLS Annual Survey to 11,700 as estimated by the National Safety Council. "The panel found it rather startling that an agreed-upon method has not been devised to estimate a phenomenon as basic as traumatic death in the workplace."

The panel made 24 recommendations in all, aimed at correcting at least partially some of these problems. I will not go into these in any detail. Fourteen of them were directed toward the Bureau of Labor Statistics. Some were directed toward OSHA, some toward the National Institute for Occupational Safety and Health, and some toward the National Center for Health Statistics. While I will not go into these in detail, I will simply raise some issues which the panel felt should be considered.

The panel felt very strongly that positive steps must be taken to assess the completeness of recording of occupational injuries and illnesses by employers. The BLS, with OSHA's collaboration, had already planned studies in Massachusetts and Missouri in which medical records in a sample of establishments would be compared against the OSHA 200 logs to determine the extent to which injuries specified in medical records were actually recorded on the OSHA logs. The panel recommended that if this approach appeared to be feasible, it be extended to a broader sample on a systematic basis. It recognized, however, that doing so would require additional personnel and that it would also require OSHA's authority to gain access to the medical records.

Thus, the panel was concerned that if OSHA devoted effort to this activity, it might reduce its inspection capability. Therefore, the panel recommended specifically that, quote, "OSHA request, and Congress approve, resources for ongoing inspection of employer practices in the recording of occupational injuries and illnesses."

Another major area in which the panel recommended that OSHA take action was that of collecting information on exposure to occupational hazards.

Even though occupational illnesses are difficult to identify, it is possible to identify some workplace hazards and to obtain some estimates of the extent to which they exist, of the number of workers exposed, and of the levels and duration of exposure. Some of this information already exists in company records as a result of samples taken because of OSHA requirements, but the information has never been collected.

Thus, the panel made the following two recommendations:

One, OSHA should enter into its Integrated Management Information System all industrial hygiene sampling data collected during OSHA health inspections, including those in States that operate their own occupational safety and health programs.

Two, OSHA should require that industry-collected exposure monitoring data for specific substances mandated by OSHA be reported to OSHA, entered into the Integrated Management Information System, and used appropriately by OSHA.

The panel felt that implementing these recommendations would go a long way toward providing information about hazardous exposure in the workplace.

Finally, I would like to depart from the published deliberations of the panel and present my own opinion, based at least in part upon discussion that took place during the course of the study.

The issue is the funding of the occupational safety and health statistics program. As I indicated earlier, the funds now come from OSHA's budget and are transferred to the BLS to carry out the program. Every time the Bureau of Labor Statistics develops plans to modify the program or to introduce an effort to assess the quality and completeness of the data, they must request funds from OSHA. Unless the requested improvement receives sufficiently high priority in OSHA's plans, it will not be funded.

This seems to be one of the underlying reasons for lack of assessment of the quality of the statistics collected by BLS.

Therefore, I recommend that the appropriation of funds for the Occupational Safety and Health Statistics Program be made directly to the Bureau of Labor Statistics. I firmly believe that such direct funding is essential to permit a strong statistical agency such as the BLS to conduct a quality program that will lead to more effective prevention of workplace injuries and illnesses.

Thank you very much.

The CHAIRMAN. Thank you very much.

[The prepared statement of Dr. Pollack, with an attachment follows:]

Testimony of

Earl S. Pollack

Study Director, Panel on Occupational Safety and Health Statistics

Committee on National Statistics

National Academy of Sciences - National Research Council

Before the

Senate Committee on Labor and Human Resources

On the

Role of OSHA in the Program of

National Statistics on Workplace Injuries and Illnesses

April 18, 1988

Washington, D.C.

Mr. Chairman and members of the Committee, I am Earl Pollack, and am currently a member of the research staff of the Biostatistics Center, George Washington University. I am testifying because of my role as Study Director for a study on the national statistics on occupational injuries and illnesses carried out by a panel under the Committee on National Statistics of the National Academy of Sciences. The panel was chaired by Dr. Seymour Geisser, Head of the School of Statistics, University of Minnesota. A list of the panel members is attached to my written testimony. In 1984, because of concerns of possible underreporting of workplace injuries arising, in part, from an OSHA policy that exempted employers from routine safety inspections on the basis of their injury records, Congress appropriated funds in OSHA's budget earmarked for the Bureau of Labor Statistics to assess the quality of its Annual Survey on Occupational Injuries and Illnesses. In response to this directive, the BLS requested the Committee on National Statistics to convene a panel of experts to address the key issues related to the collection of data on workplace injuries and illnesses.

The study was completed and the report was published in October 1987. I will summarize briefly some of the conclusions and the recommendations of the panel, particularly as they pertain to OSHA. I am also attaching to my statement a summary of the report. In my testimony I shall indicate opinions that are my own and not necessarily those of the panel, Committee on National Statistics, or the National Research Council.

First, let me give a very brief background that indicates the nature of the national program of statistics on occupational injuries and illnesses. This program resides in the Bureau of Labor Statistics, but the funds for its operation come from OSHA's budget. The BLS program in this area consists of three activities - the Annual Survey on Occupational Injuries and Illnesses, the Supplementary Data System, and the Work Injury Reports. My remarks will be confined primarily to the Annual Survey, which is the major source of the statistics.

The Annual Survey is a probability sample of the 5 million private sector establishments in the United States. Approximately 280,000 establishments are included in the sample each year. Each employer, whether included in the sample or not, is required by OSHA to keep a log of all injuries and illnesses occurring in the workplace on a form known as the OSHA 200. The Annual Survey collects a summary of a small part of this form from those establishments included in the sample. The survey forms the basis for the assessment of trends in rates of workplace injuries, illnesses, and fatalities.

In investigating the adequacy of the quality of this system, the panel arrived at six major conclusions:

1. "The BLS data systems, in their current form, are inadequate for providing OSHA with the data it needs for maintaining an effective program for the prevention of workplace injuries and illnesses."

The basic problem that the panel found here was that the data actually collected in the Annual Survey represent only a small part of that recorded and thus, do not provide enough detail to be useful for most purposes.

2. "OSHA has not demonstrated an ability to use the data it has available to it nor does it seem to recognize the need for data to manage its program."

"The panel conducted a number of interviews with key OSHA personnel and came away with a concern that the agency has little understanding of the need for data and how data might be used effectively to manage its program. Even though OSHA maintains its own Integrated Management Information System, it is based only on information obtained as a result of its inspections. Thus, it can provide counts of the number of inspections conducted, the number of citations made, the size of the penalties assessed, etc., but it does not contain systematic information on important aspects of the program such as the fatalities reported to OSHA that were not investigated, laboratory reports on exposure sampling for which OSHA did not issue citations, reports of laboratory findings from employers based on mandatory sampling, and other similar kinds of information. OSHA does not seem to have a clear understanding of the kinds of questions for which it needs quantitative information."

3. "Even if the current BLS data systems are modified, they would be unable to measure the rate of occurrence of occupational illnesses."

The basic problem here is that many of the occupational illnesses have long latent periods and thus it is extremely difficult to connect the possible exposure in a given establishment to a disease outcome that may occur several years later.

4. "No adequate evaluation of the extent of underreporting or overreporting of occupational injuries has been conducted."

Some studies have been attempted but never completed because of the difficulty in conducting them and because of insufficient funds.

5. "Only a small proportion of the information that employers are required to record on occupational injuries and illnesses is actually collected."

I referred to this problem in discussing the panel's first conclusion that current data systems are inadequate for maintaining am effective program for the prevention of workplace injuries and illnesses.

6. "There is no single agreed-upon estimate of the number of occupational fatalities in the United States."

The panel found that for 1984, for example, these estimates ranged from 3,740 based on the BLS Annual Survey to 11,700 as estimated by the National Safety Council. "The panel found it rather startling that an agreed-upon method has not been devised to estimate a phenomenon as basic as traumatic death in the workplace."

The panel made 24 recommendations in all aimed at correcting, at least partially, some of these problems. Fourteen of them were directed toward the Bureau of Labor Statistics. Some were directed toward OSHA, some toward the National Institute for Occupational Safety and Health, and some toward the National Center for Health Statistics. I will not attempt to present these in detail but will simply raise some issues which the panel felt should be considered.

The panel felt very strongly that positive steps must be taken to assess the completeness of recording occupational injuries and illnesses by employers. The BLS, with OSHA's collaboration, had already planned studies in Massachusetts and Missouri in which medical records in a sample of establishments would be compared against the OSHA 200 logs to determine the extent to which injuries specified in medical records were actually recorded on the OSHA logs. The panel recommended that if this approach appeared to be feasible, it be extended to a broader sample on a systematic basis. It recognized, however, that doing so would require additional personnel and that it would also require OSHA's authority to gain access to the medical records. Thus, the panel was concerned that, if OSHA devoted effort to this activity, it might reduce its inspection capability. Therefore, the panel recommended specifically that "OSHA request, and Congress approve, resources for ongoing inspection of employer practices in the recording of occupational injuries and illnesses."

Another major area in which the panel recommended that OSHA take action was that of collecting information on exposure to occupational hazards. Even though occupational illnesses are difficult to identify, it is possible to identify some workplace hazards and to obtain some estimates of the extent to which they exist, of the number or workers exposed, and of the levels and durations of exposure. Some of this information already exists in company records as a result of samples taken because of OSHA requirements, but the information has never been collected. Thus, the panel made the following two recommendations:

1. "OSHA should enter into its Integrated Management Information System all industrial hygiene sampling data collected during OSHA health inspections, including those in states that operate their own occupational safety and health programs."
2. "OSHA should require that industry-collected exposure monitoring data for specific substances mandated by OSHA be reported to OSHA, entered into the Integrated Management Information System, and used appropriately by OSHA."

The panel felt that implementing these recommendations would go a long way toward providing information about hazardous exposures in the workplace.

Finally, I would like to depart from the published deliberations of the panel and present my own opinion based, at least in part, upon discussion that took place during the course of the study. The issue is the funding of the occupational safety and health statistics program. As I indicated earlier, the funds now come from OSHA's budget and are transferred to the BLS to carry out the program. Every time the Bureau of Labor Statistics develops plans to modify the program or to introduce an effort to assess the quality and completeness of the data, they must request funds from OSHA. Unless the requested improvement receives sufficiently high priority in OSHA's plans, it will not be funded. This seems to be one of the reasons underlying the lack of assessment of the quality of the statistics collected by BLS. I feel very strongly that such direct funding is essential to permit a strong statistical agency, such as the BLS, to conduct a quality program that will lead to more effective prevention of workplace injuries and illnesses.

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COUNTING INJURIES AND ILLNESSES IN THE WORKPLACE: PROPOSALS FOR A BETTER SYSTEM

Earl S. Pollack and Deborah Gellerman Keimig, editors

Panel on Occupational Safety and Health Statistics
Seymour Geisser, Chair

Committee on National Statistics
Commission on Behavioral and Social Sciences and
Education
National Research Council

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SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

In the more than 15 years that have elapsed since the passage of the Occupational Safety and Health Act of 1970, there has been widespread concern that the statistics on the numbers of injuries and illnesses in the workplace, required under the act, are grossly underreported. This report focuses on the extent to which this concern is justified and on ways of improving the national statistics on occupational injuries and illnesses.

The Occupational Safety and Health Act of 1970 was passed to ensure "so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources" (PL 91-596, 1970). As a result of this legislation, the Occupational Safety and Health Administration (OSHA) was created under the assistant secretary of labor for occupational safety and health to enforce the regulations established by the 1970 act. Very specific language in the act gave an indication that the Congress recognized that statistics on workplace injuries and diseases were essential to an effective national program of prevention. The act, among other things, directed the secretary of labor to issue regulations to require employers to develop and maintain records on workplace injuries and illnesses. The secretary of labor was also directed to compile accurate statistics on occupational injuries and illnesses and to make periodic reports on such occurrences.

The responsibility for collecting statistics on occupational injuries and illnesses was delegated to the Bureau of Labor Statistics (BLS). In order to further the purposes of this act, the language was quite specific: "the Secretary shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." The purposes of the act are quite comprehensive and include the establishment of occupational safety and health standards, carrying out inspections and investigations, ensuring the maintenance of record keeping by employers on occupational injuries and illnesses, requiring reporting by employers of work-related deaths, and conducting research relating to occupational safety and health.

OSHA is charged with the responsibility of enforcing the provisions of the 1970 act, and BLS is the collector of statistics, essentially on contract from OSHA. Because it is the statistical agency within the Department of Labor, under the commissioner of labor statistics, BLS, rather than OSHA, issues the record-keeping guidelines for occupational injuries and illnesses (Bureau of Labor Statistics, 1986) that are used to attempt to standardize record keeping on these conditions across the broad range of employers. In addition to its role in developing record-keeping guidelines, BLS also has considerable interaction with employers in interpreting them, in answering a myriad of questions concerning them, and in responding to complaints that employers have regarding issues of recording requirements. Adequate record keeping is one of the issues addressed in the enforcement process. Furthermore, the data that result from these records are used to target industries for inspection purposes, and the records kept at the plant are ultimately used in the inspection of individual establishments. These facts, and the roles of BLS and OSHA in collecting statistics and enforcing regulations, respectively, can lead to the impression that BLS and OSHA are a single agency. And, if the gathering of statistics is viewed as part of the enforcement process, the credibility of the statistics could be jeopardized.

It has been alleged that the number of occupational injuries is seriously underreported primarily because those making the allegations feel that employers have a strong incentive not to report injuries. These allegations have been supported by the recent OSHA investigations of record keeping at Union Carbide, the Chrysler Corporation, the Ford Motor Company, the John Morrel Company, Iowa Beef Processors, and other employers whose citations and penalties for willful violations of record-keeping information have been the largest ever issued. For most of the occupational illnesses, there is little doubt that serious underreporting exists. The Committee on Government Operations of the House of Representatives expressed this quite emphatically in the report of its 1984 hearing on this topic when it stated: "since the passage of the Occupational Safety and Health Act nearly 15 years ago, a bipartisan failure of four administrations has thwarted the mandated development of an information and data collection system on occupational diseases. No reliable national estimates exist today, with the exception of a limited number of substance-specific studies (such as on asbestos), on the level of occupational disease, cancer, disability, or deaths. It cannot be meaningfully determined if diseases from chronic exposures to hazardous substances represent a greater problem today than when the OSH Act was passed in 1970. Such lack of reliable accurate data greatly hampers any broad-based evaluation of the OSHA program" (U.S. Congress, House of Representatives, 1984).

Hearings on this topic were held again in April 1986 by a joint session of two subcommittees of the Committee on Government Operations. After hearing witnesses from both the private sector and two government agencies--the National Institute for Occupational Safety and Health and the National Center for Health Statistics--the subcommittee concluded that the statistical information on occupational illnesses is still grossly inadequate (U. S. Congress, House of Representatives, 1986).

The concern over underreporting was heightened when OSHA changed its enforcement policy and established a targeting program that exempted employers in the manufacturing sector from routine safety inspections on the basis of their injury records. Congressional committees, labor unions, and others voiced concern that the use of employer records to determine exemptions from OSHA inspections would create an incentive for employers to underreport their actual injury experience. In 1984, in reaction to this possible underreporting and other issues related to the accuracy of the national statistics, the Congress appropriated funds in OSHA's budget earmarked for the Bureau of Labor Statistics to conduct a quality assurance study of its Annual Survey on Occuational Injuries and Illnesses.

In response to this directive, BLS requested the National Research Council to convene an expert panel to address the issue of the validity of employer records and the BLS annual survey, the problems related to the reporting and ascertainment of occupational diseases, and other key issues related to the collection and use of data on health and safety in the workplace. This report is the result of the panel's review and contains its recommendations.

CONCLUSIONS

During the course of this study the panel conducted interviews with key personnel in the agencies directly involved with the issues of statistics on occupational injuries and illnesses (the Bureau of Labor Statistics, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health). It gathered information from other sources including employers, employee unions, state occupational safety and health programs, and a number of agencies. Seven meetings of the entire panel were held in which the issues were debated, alternative approaches discussed, and possible solutions proposed and agreed upon. Summarized below are the panel's major conclusions.

> **Conclusion 1: The BLS data systems, in their current form, are inadequate for providing OSHA with the data it needs for maintaining an effective program for prevention of workplace injuries and illnesses.**

To operate an effective program on the prevention of workplace injuries and illnesses, OSHA needs data for development of standards for both safety and health, for conducting its program of enforcement of standards, and for evaluating the impact of its program. The panel reviewed the three BLS occupational safety and health data systems--the annual survey, the Supplementary Data System, and the Work Injury Reports--and noted the problems associated with each. The annual survey is a large probability sample of establishments in the United States that does not obtain information in sufficient detail needed for most purposes. The panel noted that OSHA does not have access to the individual establishment data collected in the annual survey because BLS assures the respondents to the survey that the information they provide will be held confidential. Because this is the only mandatory survey that BLS conducts, BLS believes that unless they ensure confidentiality, the response to their voluntary surveys will suffer. The Supplementary Data System is essentially a voluntary system based on workers' compensation records in which some 33 states participate. These records describe the circumstances surrounding each injury or illness, the type of injury or illness, the part of body affected, the characteristics of the injured or ill employee, disabilities, time lost from work, etc., but lack of uniformity and quality of the data raise serious questions about its usefulness as a data set that can serve all of the needs of a national program. The Work Injury Reports are based on the Supplementary Data System records but are usually confined to a small number of states and deal with specific topics. The extent to which generalizations can be made from Work Injury Report data supplied by participants so selected is a critical issue, even though these reports have been useful for some purposes.

Conclusion 2: OSHA has not demonstrated an ability to use the data it has available to it, nor does it seem to recognize the need for data to manage its program.

The panel conducted a number of interviews with key OSHA personnel and came away with a concern that the agency has little understanding of the need for data and how data might be used effectively to manage the program. Even though OSHA maintains its own Integrated Management Information System, it is based only on information obtained as a result of its inspections. Thus, it can provide counts of the number of inspections conducted, the number of citations made, the size of the penalties assessed, etc., but it does not contain systematic information on important aspects of the program such as the fatalities reported to OSHA that were not investigated, laboratory reports on exposure sampling for which OSHA did not issue citations, reports of laboratory findings from employers based on mandatory exposure sampling, and other similar kinds of information. OSHA does not seem to have a clear understanding of the kinds of questions for which it needs quantitative information.

Conclusion 3: Even if the current BLS data systems are modified, they would be unable to measure the rate of occurrence of occupational illnesses.

The basic issue here is that the information in the BLS systems is based almost entirely on data supplied by employers. The panel acknowledges that the reporting of some of the acute occupational illnesses, for example, the occupational skin diseases, may be reasonably complete. However, employers have not been able to identify and report illnesses with a longer latent period that may be related to exposures in the workplace. These conditions are difficult even for physicians to recognize; it is particularly difficult for them to identify the role of possible exposures in the workplace in the development of the disease.

Conclusion 4: No adequate evaluation of the extent of underreporting or overreporting of occupational injuries has been conducted.

BLS attempted some studies in the early years of the program, following the passage of the act in 1970, to evaluate the completeness of reporting of occupational injuries, but none has been completed. Most of the studies done by others that could provide some information on the quality of the BLS annual survey data were conducted for somewhat different purposes, and most suffered from some methodological problems.

Conclusion 5: Only a small proportion of the information that employers are required to record on occupational injuries and illnesses is actually collected.

Employers are required to record a considerable amount of information about each occupational injury and illness; however, the BLS annual survey requires them to report only the summary information on a small part of the recorded data. Some of this more detailed information is obtained in the Supplementary Data System, but not consistently state by state.

Conclusion 6: There is no single agreed upon estimate of the number of occupational fatalities in the United States.

Any employer under OSHA jurisdiction is required by law to report an occupational fatality to OSHA within 48 hours after the occurrence of the event. Employers are also required to record the information on these fatalities on the logs from which the summaries are reported to BLS in the annual survey. The National Center for Health Statistics collects information on cause of death for every death occurring in the United States, but its reporting system currently does not permit it to identify occupationally related deaths. The National Safety Council, a voluntary association, uses the NCHS data as a basis for deriving its own estimates of the number of occupational fatalities. NIOSH has constructed a mortality reporting system by obtaining death certificates from each state for deaths that are designated as occupationally related and prepares its own estimate based on them. In 1984, the size of these estimates ranged from 3,740 based on the BLS annual survey to 11,700 as estimated by the National Safety Council. The panel found it rather startling that an agreed-upon method has not been devised to estimate a phenomenon as basic as traumatic death in the workplace.

RECOMMENDATIONS

In view of these findings, the panel considered alternative approaches for solving some of the problems, or for at least improving the situation. To this end, the panel makes 24 recommendations, the text of which appears in Chapter 8. Since the major thrust of these recommendations is to improve various aspects of existing data systems, some knowledge of the systems is required to understand them.

The systems are described in Chapter 3; here we describe in more general terms what these recommendations are intended to accomplish.

Modification of the BLS Annual Survey

The modifications of the BLS annual survey that the panel proposes are aimed primarily at increasing the amount of detail it provides, particularly in the area of occupational injuries. The panel therefore recommends that data classifying occupational injuries by type of injury be reported in the annual survey; such detail is not collected by the survey at the present time. The panel further recommends that the categories of occupational illness currently on the annual survey form be replaced by an alternative classification that would more clearly distinguish acute from chronic occupational diseases. The panel believes that the former are more adequately reported in the annual survey. This approach would provide some useful information on occupational illnesses. For both occupational injuries and illnesses, the panel proposes that BLS collect more detailed information on the more serious cases (those that involve either a fatality, hospitalization, or out-patient surgery) by requiring reporting of the detailed information that employers are already required to maintain.

Supplementary Data System

The panel recommends discontinuing the current version of the Supplementary Data System, which is essentially voluntary and which varies considerably from one state to another in the quality of the information collected, depending to a large extent on the interest of the state itself in its own data. In its place, the panel recommends a grant program in which the states whose data systems can meet certain criteria for detail and quality could compete for resources to conduct data analyses and other research based on these data sets. BLS would specify the criteria on the basis of its perception of the needs for data and its knowledge of the information specific state programs are capable of producing. Such grants would also be made available to individual researchers in universities who would have access to these same data sets.

Ongoing Quality Assurance

The panel strongly recommends that BLS develop a series of approaches toward conducting ongoing evaluation of the quality of the data they collect. The emphasis of a quality assurance program should be on identifying underreporting of occupational injuries by comparing logs of injuries maintained by employers with lists of injuries at the same establishments obtained from independent sources. The panel commissioned a small pilot study to examine the feasibility of identifying occupational injury deaths from death certificates or medical examiner records and then determining whether these cases had been recorded by employers on OSHA logs. The panel concluded that this approach is feasible for occupational fatalities. The practicality of this approach for nonfatal injuries, however, is not clear. The panel therefore recommends that BLS assess the feasibility of this approach for nonfatal occupational cases by investigating other independent sources, including hospital records indicating inpatient care for workplace injuries and medical records from outpatient departments, clinics, and other medical care providers.

Occupational Disease Surveillance

The panel has indicated that the current BLS data systems are not an effective mechanism for collecting data on occupational illnesses, particularly those with long latent periods. None of the modifications that the panel recommends to the current data systems will markedly improve this situation, except possibly for some of the acute illnesses. The panel therefore recommends that maximum use be made of other data systems to obtain as complete a picture as possible of the incidence of occupational illness in the United States. Thus, it recommends that the National Institute for Occupational Safety and Health be charged with the responsibility of carrying out an ongoing occupational disease surveillance system and that it be charged with the responsibility of preparing a periodic report on the status of disease occurrence and hazardous exposures in the workplace. This would include coordinating data from a number of sources. These sources include mortality data from the National Center for Health Statistics, hospital discharge abstracts from states that have such information computerized, collaboration with the National Center for Health Statistics in developing occupational components in the National Health Interview Survey and the National Health and Nutrition Examination Survey, investigating the impediments to physician reporting of occupational disease and developing ways to overcome these impediments, making use of the experience of population-based cancer registries in identifying links between occupational exposure and cancer, and evaluating ways of incorporating data from these registries into an ongoing occupational disease surveillance system.

In the area of occupational exposure data, the panel recommends that the Occupational Safety and Health Administration enter into its Integrated Management Information System all industrial hygiene sampling data collected during its health inspections, including those in states that operate their own occupational safety and health programs. The panel further recommends that the Occupational Safety and Health Administration require reporting on industry collected exposure monitoring data for specific substances and enter them into the Integrated Management Information System. The panel recommends that the National Institute for Occupational Safety and Health compile the industrial hygiene data that it collects during its health hazard evaluations and its industrywide studies and that it analyze the data to characterize exposures in specific industries and occupations.

Occupational Fatalities

Given the vast differences in the estimates of the number of occupational fatalities in a year, the panel recommends that the National Institute for Occupational Safety and Health and the National Center for Health Statistics collaborate on improving the use of the national mortality system, based on all deaths occurring in the United States, to arrive at an ongoing approach to obtaining annual estimates of the number of occupational fatalities.

Confidentiality of Data and Consideration of an Administrative Data System

The Annual Survey on Occupational Injuries and Illnesses is the only mandatory survey that BLS conducts. However, it offers the establishments included in the sample the same assurance of the confidentiality of their responses that it does in its voluntary surveys. BLS is concerned that the absence of that assurance might jeopardize the responses to its other surveys. Its rationale for this position is based on successful BLS experience with its other surveys, in which confidentiality is carefully protected (Bureau of Labor Statistics, 1982). The majority of the panel supports this position; two of the panel members, however, believe that the Occupational Safety and Health Administration should have access to individual establishment data from the annual survey to use as a basis for targeting inspections.

The panel did agree, however, that the Occupational Safety and Health Administration should be able to obtain individual establishment data and that this might be achieved through the development of an administrative data system, such as that maintained, for example, by the Internal Revenue Service (Wilson, 1987; Knott, 1979). A number of issues would need to be considered in developing such a system, such as whether it should be operated by OSHA and, if so, what kinds of changes in OSHA staffing, expertise, and attitudes would be required; whether it should be operated by BLS and, if so, what the effect might be on its other surveys; whether data should be collected from every establishment, or from establishments that meet certain criteria; how extensive the data set should be; and whether such a system could meet all the needs for data specified in Chapter 4.

The panel believes that such an administrative data system should not be operated in parallel with the current BLS systems. Thus, if it proved to be feasible and if it replaced the current systems, the question of whether an administrative data system could meet all of the data needs is a critical one.

The panel did not feel that it had the time or the specific expertise to consider all of these issues related to an administrative data system in the kind of detail that would be required. Therefore, we suggest that BLS and OSHA obtain the appropriate outside expertise to consider whether the development of such a system is feasible for providing OSHA with all of the data it needs, including those at the individual establishment level, to conduct an effective program for the prevention of workplace injuries and illness and, at the same time, for meeting all of the other needs for data specified in Chapter 4.

Inspection Resources

The panel recognized that more thorough evaluation of record-keeping practices on the part of individual establishments is needed in order to determine whether occupational injuries are underreported and, if so, to develop ways to improve reporting. The panel is concerned, however, that increasing efforts in this direction might result in reducing the number of inspections of workplace hazards. Therefore, the panel recommends that the Occupational Safety and Health Administration request additional resources for this purpose and that such a request be granted by Congress.

The CHAIRMAN. Before getting back to the other witnesses, Dr. Pollack, let me ask how would you respond to OSHA's suggestion that their statistics and their way of collecting data is just fine. In spite of the recommendations of the Academy of Sciences and your own review, they think they get the kind of information that they need in order to be able to take whatever steps they feel are appropriate in terms of fulfilling the requirements of the Act.

Dr. POLLACK. Well, I think this just simply demonstrates their lack of understanding of the need for data to understand what some of the problems are. And as a matter of fact, in discussing some of these problems with members of the OSHA staff, some of the staff members themselves expressed the need for certain data and the inability of obtaining that information from their own system.

The CHAIRMAN. Do you think it is just reluctance to change, or do you think it is because OSHA has done it this way for a long time, and therefore OSHA wants to continue doing it that way; or do you think it is because perhaps some of the sectors which they are charged to cover prefer to have the data assembled the way that it is being done at the present time instead of in the way that you suggested or that the Academy of Sciences suggested?

Can you draw any conclusions at all?

Dr. POLLACK. Not really. The specific reasons were not at all clear. As a matter of fact, it may be some of all of those. But I think the basic underlying problem is lack of understanding and lack of feeling the need for data.

The CHAIRMAN. Do you think there is broad agreement in the Academy of Sciences among the statisticians and experts on the conclusions that were reached and the recommendations that were made.

Dr. POLLACK. From the statistical community?

The CHAIRMAN. Yes.

Dr. POLLACK. Yes, indeed, and from the occupational safety and health field in general. The response from the Bureau of Labor Statistics has been excellent. They are trying very hard to respond to these recommendations and to make changes.

The CHAIRMAN. Dr. Landrigan, let me just review some points with you so we have the record clear. You were formerly at NIOSH; is that correct?

Dr. LANDRIGAN. Yes, sir, as a Division Director for six years.

The CHAIRMAN. And you are currently the Director of the Division of Environmental and Occupational Medicine at Mount Sinai Hospital.

Dr. LANDRIGAN. That is correct.

The CHAIRMAN. And you said that occupational diseases are almost entirely preventable because exposures to hazardous substances can be controlled.

Are engineering controls the best method for protecting the health of workers from toxic substances?

Dr. LANDRIGAN. For the most part, yes. The two major alternatives here are engineering controls on the one hand, and personal protective equipment on the other. There are some instances, of course, such as fire-fighting, where there is no alternative except to use personal protective equipment. We all accept that. But whenever possible, there is no doubt whatsoever that engineering controls are preferable, because they reduce exposures at the source, rather than relying on the worker wearing cumbersome, awkward and often inefficient equipment.

The CHAIRMAN. And is there a clear consensus in the scientific community about the preference for engineering controls over respirators?

Dr. LANDRIGAN. Yes, there is, and for many years, NIOSH has so stated.

The CHAIRMAN. And do you think any effort to undermine that policy by giving the employer discretion to decide whether to use respirators or engineering controls would be seriously harmful to the health of workers?

Dr. LANDRIGAN. It places the health of many workers in jeopardy.

The CHAIRMAN. For the reasons that you have just outlined.

Dr. LANDRIGAN. Yes, because much personal protective equipment is simply inefficient. An insistence that workers wear protective equipment in lieu of cleaning up the workplace means that systems for primary prevention are simply not given an incentive to flourish.

The CHAIRMAN. Mr. Moran, you were the former Director of the Division of Safety Research at NIOSH; is that correct?

Mr. MORAN. That is correct.

The CHAIRMAN. I had some questions, but you have covered most of them in your testimony.

Let me ask you this. While you were at NIOSH, you conducted a census of workplace deaths, and you estimated that there were 7,000 deaths each year on the job. How does that figure compare with the workplace death count by the Bureau of Labor Statistics?

Mr. MORAN. That figure is approximately twice that reported by the Bureau of Labor Statistics, and it is also derived from a uniquely different source. What we did in that program was literally go out and work with every one of the vital statistics offices in all States in the country and obtain from them physical copies of death certificates that were marked "Occurred at Work", which is one box on the standard death certificate.

So we literally have, over the five-year period for which the report was generated, 35,000 death certificates sitting in the files in Morgantown.

Now, the number by year declined until about 1982, and then began going up again, so that has been increasing. And I would also view that number—that is about an average over that period—as being a minimum because if there were death certificates that the States missed in going through their records, they would not have been submitted. So we physically have that many per year.

The CHAIRMAN. Well, hasn't OSHA claimed that according to the fatality figures from the BLS that the agency has met its target figure for reducing workplace fatalities?

Mr. MORAN. The BLS number, as I think Dr. Pollack has briefly discussed, is based on a survey of a small percentage of U.S. establishments, and when you start looking on the basis of that small survey at the number of fatalities, the statistical power is very, very weak.

The CHAIRMAN. And your own study shows the BLS figure seriously underestimates the actual number of fatalities?

Mr. MORAN. Yes, that is correct.

The CHAIRMAN. All right. This has been an enormously distressing hearing today for the American workers and for all those who believe that OSHA is really doing the job it was created to do—to protect the health and safety of workers. I think the testimony we have heard today has come from individuals who have an irrefutable record of competency and experience and knowledge about these types of issues and questions. Many have been in the agency or have reviewed the agency's work.

We are going to continue our hearings tomorrow to hear from various employees of OSHA and victims of OSHA's failures. Then we are going to have an opportunity on Wednesday to hear the responses by the agency itself to respond to these allegations and charges, which I think were well-documented today.

So I think certainly, in fairness to the agency, we want to hear them out, but I think they are going to have their hands full.

I want to just say again what I said at the outset. The individuals who appeared before us have been working in the agency, have worked in NIOSH and clearly were imaginative and creative and really went to enormous lengths in trying to fulfill their responsibilities. And that, I think, is perhaps a service that is not nearly as well-appreciated as it should be. So I want to thank you all, for the work that you have done in the past and for your continuing willingness to follow these issues. Many people who are in agencies perform admirably and don't receive the appreciation of the American people as they should.

I think the fact that you continue to follow these issues with skill and competency, is a very significant public service, and I want to thank you all very much.

[Additional material supplied for the record follows:]

STATEMENT

BY

JOHN C. BROOKS

COMMISSIONER OF LABOR

STATE OF NORTH CAROLINA

UNITED STATES SENATE

COMMITTEE ON LABOR AND HUMAN RESOURCES

Statement Presented For the Record

Committee Hearings Conducted

April 18, 19, 20, 1988

Mr. Chairman and Members of the Committee:

As the elected Commissioner of Labor for the State of North Carolina, I serve as the State Designee for our state occupational safety and health program. I had hoped to provide testimony in person before this Committee in order that you might hear first-hand from a state program about the very important issues that you, Mr. Chairman, and others have raised concerning the Occupational Safety and Health Administration. While we join with many others in applauding the Committee for holding these hearings, we believe that it was a serious oversight not to include representation from at least one state program. The hearings did provide for input from the General Accounting Office concerning the "monitoring and evaluation" of state programs, but there was no opportunity for direct input from the state programs. State programs accomplish greater than fifty percent of the enforcement of occupational safety and health standards; yet state programs do not necessarily follow the same guidelines and policies that were discussed during these hearings. We believe that if you are to make an accurate assessment of what is being done to protect the safety and health of the nation's workers, you cannot overlook the very important contributions that are being made by the states with approved occupational safety and health programs.

Testimony was presented which was severely critical of "OSHA". "OSHA" is the acronym for the Occupational Safety and Health Administration, but it is also often used to refer to approved state plans in states operating occupational safety and health programs under state law. While we don't necessarily wish to take sides either with federal OSHA or its critics concerning the issues presented at these hearings, we do want the record to reflect that many, if not most, of those criticisms do not apply to most state programs.

The Occupational Safety and Health Act of 1970 is indeed landmark legislation. Congress declared, "it to be its purpose and policy . . . to assure so far as possible every working man and woman in the nation safe and healthful working conditions . . . ." We agree wholeheartedly with Senator Metzenbaum's declaration during these hearings that there is no greater responsibility in our government than providing safe and healthful workplaces.

Section 18 of the Act provides for a unique "partnership" between federal and state governments, perhaps unparallelled, to carry out this responsibility. Under this arrangement, 23 states and two territories are presently exercising this option to be a "partner" with the federal government in attempting to assure, so far as possible, safe and healthful working conditions for the working men and women of our country.

Presently, 20 of these states and two territories operate complete state programs covering both private and public sector employers and employees. Of these 22 jurisdictions, North Carolina is the second largest in total population, and in employers and employees covered by the state program. Two states, New York and Connecticut, operate state programs covering only public sector employers and employees. The remaining state, California, is presently covering only the public sector while the withdrawal of their state program, initiated by the Governor of California, is being litigated. Federal OSHA provides coverage of private sector employers and employees in 30 states (including California) and the District of Columbia.

The inclusion of Section 18 in the Occupational Safety and Health Act of 1970 caused some critics to be skeptical as to the perceived performance of state programs. Those fears, however, have been unfounded. The states that successfully sought approval to operate their own programs, and that have continued to administer these programs, have persevered and succeeded because they are truly committed to better serving the workers and the employers in their states than would be the case under federal OSHA. State programs have proven to be both more effective and cost efficient. More inspections have been conducted, more violations cited, and more hazards abated at a lesser cost to the taxpayers by states with state programs than by federal OSHA.

In fiscal year 1987, state programs conducted approximately 110,000 inspections compared to approximately 61,500 conducted by federal OSHA. Also in fiscal year 1987 state programs cited approximately 299,000 violations of safety and health standards compared to approximately 137,000 cited by federal OSHA. (During fiscal year 1987 the State of California and federal OSHA each conducted inspections and issued citations in California.)

State programs are continually judged by federal OSHA as to whether or not they are "as effective as" federal OSHA. As federal administrations change, we are continually being compared to a "moving target". As a consequence, most state programs recognized long ago that we must make our own judgements and not automatically "rubber-stamp" policies adopted by each new federal OSHA hierarchy.

One issue of concern brought out in these hearings involved the so-called "records review" inspections whereby a federal compliance officer would check the injury/illness records of an employer, and based on what those records revealed, an inspection might or might not be conducted. Without going into the wisdom of this policy, we want the record to reflect that in North Carolina, and most other state programs, this procedure was intentionally not adopted for precisely the reasons that have caused it to be criticized.

We could relate one specific example after another where state programs do not follow the policies criticized in these hearings. We believe that this is not necessary. One particular issue we do want to address, however, is the issue of standards promulgation. As was indicated by the testimony, the federal hazard communication standard is being expanded pursuant to a court order. North Carolina, and most other state programs, broadened the scope of the standard when it was first adopted. Obviously this "right-to-know" is not an exclusive "right" for manufacturing employees.

Many of the states have addressed other issues long before federal OSHA. These include issues as diverse as confined space entry to field sanitation. In North Carolina we adopted a field sanitation standard in 1983. Federal OSHA last year adopted a field sanitation standard only after being directed to do so by court order. However, the limitations encompassed in the scope of that standard disenfranchise most of the workers that the federal act and the court order would intend to protect.

Much testimony was recorded concerning the inactivity of federal OSHA to more adequately address the safety and health needs of workers through the promulgation of needed standards. Testimony was provided by safety and health professionals from within federal OSHA, and by the unfortunate spouses and families whose loved ones have been tragically lost. Clearly there are many issues, such as confined space entry, that need attention immediately! However, please understand that the promulgation of a standard does not mean that there will be automatic compliance with that standard. Enforcement, education, training, and consultation must still be provided to assure understanding and compliance with the standard. This requires resources, particularly health resources, since so many of these are health issues.

We detected a tone during the course of these hearings that indicated that perhaps the present administration in Washington is not requesting sufficient funds from Congress to adequately carry out the statutory mandate of assuring safe and healthful workplaces. We agree with that perception--particularly as it applies to the funding of state programs.

In fiscal year 1987, OSHA provided the 25 state programs approximately 51.5 million dollars. OSHA's total Fiscal Year 1987 budget was approximately 228.4 million dollars. The estimated figures for fiscal year 1988 indicate a total OSHA budget of approximately 234.5 million dollars of which only 40.5 million is estimated for state programs. (The primary reason for this shift is the withdrawal of the California state program.)

The "partnership" between federal OSHA and the states established under Section 18 of the Act is also unique in that only one of the "partners" is involved in the budget process for the allocation of funds. Assistant Secretary John Pendergrass testified before the House Appropriations Subcommittee on March 23, 1988, and presented a funding request for fiscal year 1989 for the Occupational Safety and Health Administration which reflects a four and one-half percent increase from fiscal year 1988 levels. The specific line item for state programs, however, reflects only a two-percent increase. These figures were determined without any input from the state programs as to their particular needs. In fact, when Mr. Pendergrass was asked to explain this discrepancy at a recent meeting involving the state plan states and federal OSHA, he refused to respond.

In each appropriations bill enacted by Congress commencing with fiscal year 1983, the following language pertaining to state programs has been included, "which shall be the maximum amount available for grants to states under Section 23(g) of the Occupational Safety and Health Act, which grants shall be no less than fifty percent of the costs of state occupational safety and health programs required to be incurred (emphasis added) under plans approved by the Secretary under Section 18 of the Occupational Safety and Health Act of 1970 . . . ."

What does this language mean? Does it mean that federal OSHA, when determining the individual amounts to be allocated to specific state programs shall first consider that states are adequately funded to meet their respective benchmarks as required in the case of AFL-CIO v Marshall? We have posed this question to Mr. Pendergrass without response.

Clearly, all states are not being funded at a level commensurate with "fifty percent of the costs . . . required to be incurred . . ." The revised benchmarks for North Carolina approved by federal OSHA in January 1986 call for 50 safety compliance officers and 27 health compliance officers. The grants for North Carolina approved for fiscal years 1986, 1987, and 1988 authorize federal matching funds for only 35 safety compliance officers and 11 health compliance officers.

As indicated above, the state program for North Carolina represents the second largest jurisdiction (employers and employees) covered by a state plan pursuant to Section 18 of the Act. However, based upon the best information available to us from federal OSHA, North Carolina in fiscal year 1987 ranked only sixth in the amount of federal funds awarded. (Because of the present status of the California state program, their funding is not considered in this ranking.) For several years, however, North Carolina has requested, and been able to match, additional funding up to as much as an additional $700,000 requested in fiscal year 1986 to move toward our obligation of meeting the required benchmarks.

In summary, we would agree that there is much that remains to be done in order to assure safe and healthful workplaces for America's workers. We would also reaffirm the commitment of the North Carolina state program and the other state programs in trying to accomplish this goal. We believe that, while the records established by state programs are also not perfect, that as suggested by the data discussed above, the accomplishments probably exceed those of federal OSHA. And, unlike federal OSHA, we recognize that we severely need additional resources in order to fully carry out the federal and state legislative mandates for safe and healthful workplaces.

We, therefore, respectfully request that this Committee and its individual members support the allocation of additional funding for state programs in order that state programs will not just remain "as effective as" federal OSHA, but be able to realistically move toward the goal of becoming "fully effective" in trying to assure so far as possible safe and healthful workplaces for the workers in America. We ask for your assistance in our efforts to make that goal become a reality. Thank you.

The **Chairman**. We will recess until tomorrow morning at 9:00 o'clock.

[Whereupon, at 4:30 p.m., the Committee was adjourned, to reconvene Tuesday, April 19, 1988, at 9 a.m.]

OVERSIGHT OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

TUESDAY, APRIL 19, 1988

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee resumed, pursuant to adjournment, at 9:15 a.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman) presiding.

Present: Senators Kennedy, Metzenbaum, and Simon.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. We will come to order.

Today we will see the human face of the numbers we reviewed at length yesterday afternoon. We must remind ourselves, as those in this Administration who have repealed the protections that our workers enjoy must also be reminded, that the laws of worker safety are not written on parchment, but on skin.

Families and futures are broken when workers lose their lives in the workplace. And as the Chairman, I invite any of the agencies or companies mentioned today to respond for the record to the allegations made about them. We are interested in being fair, and these are oversight hearings on OSHA, which necessarily makes us inquire into particular cases and specific agencies. All of them are invited to make their case.

The first panel this morning will be seven professionals from OSHA's Health and Safety Standards Division.

We welcome Dr. Sheldon Weiner, Mr. John Martonik, Dr. Susan Harwood, Ms. Jennifer Silk, Dr. Peter Infante, Dr. Imogene Rodgers, and Mr. James Scully. We are pleased to have all of you here, with your very considerable expertise.

We will start with Mr. Martonik.

STATEMENTS OF DR. SHELDON WEINER, JOHN MARTONIK, DR. SUSAN HARWOOD, JENNIFER SILK, DR. PETER INFANTE, DR. IMOGENE RODGERS, AND JAMES SCULLY

The CHAIRMAN. Mr. Martonik, what is your position at OSHA?

Mr. MARTONIK. I am the Deputy Director of Health Standards Programs for the Occupational Safety and Health Administration.

The CHAIRMAN. And how long have you been working on health standards?

Mr. MARTONIK. I have been the Deputy Director since 1981.

The CHAIRMAN. And Dr. Weiner, what is your position?

Dr. **Weiner**. I am the Director of the Office of Standards Analysis and Promulgation.

The **Chairman**. And how long have you been working on health standards?

Dr. **Weiner**. For 9 years.

The **Chairman**. And are you responsible for the project concerning the methods of compliance policy?

Dr. **Weiner**. Yes, I am.

The **Chairman**. I understand that the policy concerns the relative merits of engineering control versus respirators?

Dr. **Weiner**. That's correct.

The **Chairman**. And does the current policy require employers to use engineering controls rather than respirators to the extent that they are feasible?

Dr. **Weiner**. Yes, for the most part, that is true.

The **Chairman**. Is that a basic principle of industrial hygiene?

Dr. **Weiner**. Yes, it is.

The **Chairman**. And why is this so important for protecting the health of workers?

Dr. **Weiner**. Well, if no contaminant is present, it is not very easy to be damaged by it. If the contaminant is present, then you have to rely on an imperfect device to remove it from your breathing zone.

The **Chairman**. Well, is there a consensus among current authorities in the field that engineering controls are preferred over respirators?

Dr. **Weiner**. Yes, there is.

The **Chairman**. We heard testimony from Dr. Landrigan yesterday that without question, engineering controls are more protective for workers than respirators.

I also have a copy here of a 1985 report from the OTA, Office of Technology Assessment. It says, "OTA's analysis of the literature indicates that respirators provide the protection that is claimed for them only in workplaces that provide scrupulous supervision of maintenance and use. Those conditions are rare."

"To turn away from the hierarchy of controls without careful verification of the levels of protection afforded by personal protection devices is likely to increase exposures to health hazards."

Effectively, as I understand it, there may be circumstances where you use the respirators, but those are unique, and by and large, there is overwhelming evidence that the engineering controls are preferred.

Now, despite this clear consensus, did the President's Task Force on Regulatory Relief recommend revising the methods of compliance policy in 1981?

Dr. **Weiner**. Yes, it did.

The **Chairman**. And are respirators generally less costly to industry than engineering controls?

Dr. **Weiner**. For the most part, yes.

The **Chairman**. And have they been shown to be as protective to workers?

Dr. **Weiner**. They have not been shown to be as protective, and in my view, there is no way they could be shown to be as protective.

The CHAIRMAN. Mr. Martonik, do you agree?

Mr. MARTONIK. I agree with that.

The CHAIRMAN. Did OSHA begin rulemaking on the methods of compliance issue in 1983 at the urging of the Office of Management and Budget by publishing an Advance Notice of Proposed Rulemaking?

Dr. WEINER. Yes, we did.

The CHAIRMAN. And Dr. Weiner, does OMB often get involved in OSHA's standard setting process?

Dr. WEINER. Invariably.

The CHAIRMAN. I have over here a chart—I don't know whether you can all see it—which is the general outline for the rulemaking. We can see there are three different areas that OMB is called upon to respond and react to various proposals.

Other than with respect to economic or paperwork consideration, does OMB involve itself in scientific and technical issues?

Dr. WEINER. Yes, it does.

The CHAIRMAN. And does OMB have a staff of health scientists?

Dr. WEINER. None that I have ever met.

The CHAIRMAN. Well, what do they have?

Dr. WEINER. The only people at OMB that I know of are either economists or have backgrounds in public administration.

The CHAIRMAN. So here are OMB economists, successfully urging OSHA to proceed with rulemaking on the methods of compliance policy, even though both of you as health scientists disagreed with this decision; is that right?

Dr. WEINER. Yes, it is.

The CHAIRMAN. I think we are going to hear quite a bit of testimony this morning about OMB's economists second-guessing OSHA health scientists.

Dr. Weiner, did you analyze the comments received from the Advance Notice of Proposed Rulemaking and prepare an options memorandum in 1986 from the Assistant Secretary to the Department of Labor's Policy Review Board, based on your analysis?

Dr. WEINER. Yes.

The CHAIRMAN. And what is the Policy Review Board?

Dr. WEINER. The Policy Review Board is a committee composed of high-level executives from every Department of Labor agency.

The CHAIRMAN. And does Assistant Secretary Baroody have a staff of health scientists as well?

Dr. WEINER. Not that I know of.

The CHAIRMAN. So does OSHA have to obtain the approval of the Board before taking any actions on regulations?

Dr. WEINER. Yes.

The CHAIRMAN. So that is why you had to prepare this options memo?

Dr. WEINER. Yes.

The CHAIRMAN. I have a copy of that memo. This is OSHA's memorandum, and the part relating to the regulatory options states: "Recommended Action: Maintain OSHA's current policy. It is my strong recommendation that OSHA should not take action to revise or promulgate any standard in order to suggest a lessening of its current reliance on engineering controls."

Then it continues, "In the absence of specific data and well-documented arguments opposing OSHA's present policy, and in the face of overwhelming scientific, professional and industrial support for it, it is not possible to justify the erosion of an effective working system."

[The memo referred to above follows:]

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

MEMORANDUM FOR: POLICY REVIEW BOARD

INTERNAL DOCUMENT NOT RELEASABLE UNDER FOIA

FROM: JOHN A. PENDERGRASS
ASSISTANT SECRETARY

SUBJECT: Options Memorandum Concerning Revision to the Methods of Compliance Requirements in Meeting OSHA's Permissible Exposure Limits

SUMMARY:

OSHA is evaluating the appropriateness of its existing policy that requires employers to achieve compliance with established permissible exposure limits (PEL) primarily through implementation of feasible engineering controls. Primary reliance on respirators is permitted where engineering controls are determined to be infeasible, where engineering controls do not achieve full compliance, and in other specific circumstances described later. This policy has been criticized by OMB and some industry parties as being too inflexible, not cost-effective, and often unnecessary for health protection. Also, critics contend that significant progress has been made in respirator technology and application which warrants greater reliance on respirators for exposure control. OSHA has considered it appropriate, therefore, to evaluate the validity of its policy of requiring the implementation of feasible engineering methods as the primary means of controlling exposure to toxic substances.

OSHA believes strongly that the maintenance of the current policy is consonant with optimum worker protection and is consistent with established industrial hygiene practice. However, there may be limited areas in which some modification to the policy would not compromise worker protection, but would permit more cost effective controls to be implemented. These areas should be cautiously explored and, by way of example, are discussed in this memorandum.

LEGAL AUTHORITY:

The legal authority for action that might lead to revision or promulgation of a standard is based on Section 6(b) of the Occupational Safety and Health Act of 1970 (P. L. 91-596).

BACKGROUND:

OSHA's methods of compliance policy, first adopted by OSHA from national consensus standards in 1971, and subsequently included in the substance specific health standards OSHA has promulgated, requires that employers primarily use feasible engineering controls to prevent employee exposures from exceeding the PEL's. This policy is codified in the standards covering air contaminants (1910.1000) which were adopted after Section 6(a) rulemaking, in each health standard adopted after Section 6(b) rulemaking, as well as the respiratory protection standard (1910.134), and the Cancer Policy (29 CFR 1990). In addition, most substance specific standards accord the same control priority to work practices as to engineering controls.

As specified in more detail on page 8, some substance-specific health standards identify work operation's where engineering controls are considered infeasible and where primary reliance on respirators is permitted. The standards allow respirator use in emergencies, in situations where engineering controls are not adequate, are not feasible, or where they have not yet been installed. Where feasible engineering controls are not sufficient to reduce exposures to or below the PEL, they must nonetheless be used to reduce exposures to the lowest practicable level, and be supplemented by respiratory protection. This policy reflects a fundamental industrial hygiene principle that contaminants be controlled at their source, to the extent feasible. (Patty's Industrial Hygiene and Toxicology, Vol. I., p. 771).

This current policy is felt by some, however, to be too inflexible, not cost-effective, often unnecessary for health protection, and outdated based on the argument that sufficient progress has been made in respirator technology and application to permit their use on a wider scale.

In order to address these criticisms, and at the urging of OMB, OSHA published an ANPR on February 22, 1983, to solicit public comment on issues such as the preference for engineering controls, comparative protectiveness of respirators and engineering controls, total costs of respirators and engineering controls, and the use of engineering controls even if such controls fail to reduce levels to below the PEL. OSHA was also looking for information that would help the Agency to focus on three primary policy considerations:

The first consideration was health protection. There is great diversity in the types and sizes of workplaces that are affected by OSHA standards. Because conditions in these workplaces are so variable, it is important that methods of compliance for each workplace be the most effective. It has been postulated that there may be many instances where respirators would provide greater protection to employees than engineering controls, and that their routine use should be permitted.

The second consideration was the contention that respirator technology and use practices have progressed significantly since initial adoption of OSHA's compliance requirements in 1971. As a result of many of these advances, the consensus among many occupational health professionals concerning what constitutes a reasonable, effective respirator program has changed. This point is demonstrated by the issuance of the American National Standards Institute (ANSI) Z-88.2-1980 standard, entitled "Practices for Respiratory Protection," a revision of the 1969 ANSI standard. It was suggested, therefore, that respirators would be capable of taking a more significant role in air contaminant protection than they have had before.

The third consideration was cost-effectiveness. There may be instances, it has been argued, where the costs of engineering controls would exceed the expected costs of respiratory protection, and where the routine use of respirators may provide adequate employee protection. Should such instances exist, reasonable allowances for the use of respiratory protection should be made.

For the foregoing reasons, it was felt to be timely and appropriate to reexamine OSHA's policy on methods of compliance.

Over 135 ANPR comments were received, with a wide range of responses from industry, labor, health organizations, and others. Some industry commenters called for increased flexibility and an abandonment of the preference for engineering controls, while others continued to support the concept of primary reliance on engineering controls. Labor unions opposed any change in the role of respirators in current programs. Health professional groups, NIOSH, and research laboratories such as Los Alamos and Lawerence Livermore also opposed changing the existing policy.

ISSUES:

The conclusions that have been made from analysis of the comments on the major issues addressed in the ANPR are discussed below. They concern the relative effectiveness of control methods, instances where respirator use is appropriate, and general practice and policy in industry with respect to exposure control.

A. Relative effectiveness of control methods

Data in this and other rulemaking records (ethylene oxide, cotton dust, DBCP, acrylonitrile, arsenic, lead, asbestos, cancer policy) support the industrial hygiene principle that engineering controls, where feasible, are more effective in controlling exposure than other means.

Commenters representing unions, (2-53, 2-102, 2-122, 2-98), universities (2-120), research organizations (2-128, 2-131, 2-81), and health associations (2-89), contended that the requirement to implement feasible engineering controls should be maintained. Industry representatives supporting the primacy of feasible engineering controls included AT&T (2-59), DOW (2-71), Monsanto (2-88), ALCOA (2-103), American Gas Association (2-77), National Agricultural Chemical Association (2-76), National Paint and Coating Association (2-78), Motor Vehicle Manufacturers Association (2-95), and the American Institute of Chemical Engineers (2-132).

These commenters agreed that engineering controls provide reliable and consistent levels of protection to a large number of workers and are not dependent on individual human performance. Data submitted to the record support this assertion. Performance of engineering controls can be monitored continually, inexpensively, and can be predicted at the design stage. As stated by DOW, "The primacy of engineering controls for controlling exposure is an accepted principle of occupational health" (2-71). AT&T commented that "Engineering controls should always be given primary consideration " (2-59).

A number of other commenters, however, insisted that when respirators are properly selected, maintained and conscientiously worn, they provide adequate, reliable protection for routine use in general industry (2-52, 2-130, 2-133, 2-67, 2-119, 2-62). However, none of these comments included substantive data that demonstrated the validity of this assertion. Nor did they provide any support for the assertion that routine respirator use in general industry could provide protection equivalent to or better than engineering controls. On the contrary, Los Alamos' Industrial Hygiene Group stated that "...there are no analytical results to indicate that respirators offer equal or better protection than engineering controls" and "with very few exceptions....respirators simply cannot offer the same degree and reliability of protection to employees, as properly designed and operated engineering controls" (2-131). Moreover, data in the record on respirator use in six industries, submitted by John Hopkins School of Hygiene and Public Health (2-64), show that the level of respirator protection in the field is below that of respirator protection factors determined in the laboratory. Similar results of poor field performance of respirators are documented by a substantial number of studies that have been submitted to OSHA's Respiratory Protection standard docket (H-049). Recognition of this quantified finding of the unpredictability of respirator performance in the field is of utmost importance with respect to the issue at hand.

Further, many industry commenters stated that even if OSHA changed its methods of compliance policy with respect to respirators, they would continue to employ the use of feasible engineering controls as the primary means of exposure control, and would not place greater reliance on respirators. It must be assumed that a voluntary continuation of this policy by these employers is a statement of their belief that engineering controls are preferable from a health and safety viewpoint and that they are reasonable and feasible in their workplaces. These industry groups include:

ALCOA, Motor Vehicle Manufacturers Association, Koppers, Battery Council, Monsanto, Chlorine Institute, National Agricultural Chemical Association, CMA, AT&T, ORC, Texas Chemical Council, and DuPont.

The following specific problems associated with respirators were raised in comment to the record; 1) factors that may result in poor respirator performance are difficult to control by the employer; 2) workers cannot wear respirators on a full-time or extended basis; 3) workers complain that respirators are uncomfortable, interfere with the job and are physically stressful; 4) actual respirator performance cannot be precisely anticipated and varies with each person and with each usage; 5) respirator fit factors determined in the laboratory are not equivalent to workplace experience; and 6) many substances do not give adequate warning (e.g. odor) if respirators fail.

A successful respirator program depends largely on management commitment, training, and continuous monitoring of proper respirator use. While many employers do exercise such commitment, OSHA's citation record (Exhibit 33-5, Docket H-049) shows that a very large number do not. For example, in the period Fiscal 1977 through 1982, of inspected worksites in which respirators were in use to provide protection from a documented excessive level of air contaminant, 59% had deficiencies in at least one respirator program area. Many of the violations were of the type that have been shown to lower the level of protection provided by the respirator. Frequently cited major program violations included respirator fit, respirator condition, unapproved or unsuitable respirator, and lack of continuous wear. Further, medical problems and other specific situations may preclude use of respirators (2-131, 2-81, 2-120, 2-128, 2-129, 2-114, 2-103, 2-132). It was also pointed out that the true performance of respirators in workplace use is always indeterminate during the actual use period, but that the effectiveness of engineering controls can be predicted, and commercially available state-of-the-art devices can be installed or used to monitor performance (2-131). The unpredictabilty of the protectiveness of respirators during field use is demonstrated in studies submitted to the Respiratory Protection standard Docket H-049 (Exs. 27-2, 4, 9, 10, and Exs. 38-2, 3, 7).

In conclusion, the data submitted to the record clearly point to the supremacy of engineering controls to respiratory protection in almost all cases. Respirators can appropriately provide a second line of defense where engineering or work practices are inadequate, rather than the sole means of protection. Moreover, in some instances as discussed below, it may be necessary to use respirators as the primary method of control. OSHA recognizes these situations in its current standards by listing them as situations which may necessitate the use of respirators by affected employees.

B. Appropriate use of respirators

The record does identify specific situations where engineering controls may not be feasible, and where respirators may have to be used. Most commenters recognize the existence of these situations and acknowledge that respiratory protection would be the only available means of exposure control in these instances. Where it is commonly acknowledged that engineering controls are not feasible, it is appropriate for the employer to utilize respirators. Respirators may be the only means of protection in the following situations:

1. During the time necessary to install feasible engineering controls;
2. Where feasible engineering controls cannot reduce exposure to acceptable levels. These would include nonroutine field situations where there is a lack of utilities for implementing engineering controls;
3. During emergencies, including life saving, recovery operations, repair, and shutdowns;
4. Operations requiring an added degree of protection or where there is the possibility of failure of normal controls; and
5. Entries into unknown atmospheres.

There are no substantive data in the Methods of Compliance ANPR record which indicate that respirators would be the best or only means of protection for activities other than those listed above. OSHA's existing methods of compliance requirements in the air contaminant standard (29 CFR 1910.1000), in other 6(b) standards, and OSHA's enforcement posture recognize the validity of controlling exposure in the above instances by using respiratory protection. In addition, for reasons concerning feasibility, OSHA substance specific standards allow primary reliance on respirators in other circumstances, which vary from substance to substance, and which were identified after 6(b) rulemakings (see p. 8).

REGULATORY OPTIONS:

A. Recommended Action: Maintain OSHA's current policy.

It is my strong recommendation that OSHA should not take action to revise or promulgate any standard in order to suggest a lessening of its current reliance on engineering controls. The ANPR record does not support such an action on the grounds of health protection, respirator effectiveness, or cost-effectiveness. During the time of OSHA's existence the concept of the implementation of feasible engineering controls has become well established. A history of legally and scientifically supported principles has become accepted by most companies as the best approach to occupational health. In the absence of specific data and well-documented arguments opposing OSHA's present policy and in the face of overwhelming scientific, professional and industrial support for it, is not possible to justify the erosion of an effective, working system.

It is important to note that the current compliance policy does not mandate the use of engineering controls in all cases. There are recognized situations and conditions in which engineering controls are not required and in which respirator use is permitted. For example, the following standards permit the use of respiratory protective devices during installation of feasible engineering controls, where engineering controls are not feasible, and where engineering controls do not achieve full compliance: asbestos, arsenic, lead, coke ovens, cotton dust, DBCP, acrylonitrile, and ethylene oxide. Other specific allowances for respirator use can be found in standards for asbestos (spraying, demolition, or removal), arsenic (maintenance and repair), lead (for employees exposed less than 30 days per year), coke ovens (maintenance and repair), cotton dust ("blowdown"), DBCP (maintenance and repair), acrylonitrile (maintenance, repair, and vessel cleaning), and ethylene oxide (collection of quality assurance samples, removal of biological indicators, loading and unloading of tank cars, changing ethylene oxide tanks, vessel cleaning, and maintenance and repair activities). These examples provide a clear indication of the Agency's realistic expectations with respect to the implementtation of engineering controls and of the flexibility implied with respect to the meaning of "feasible engineering controls." In addition, in an enforcement context, employers may demonstrate that for specified operations, engineering controls are technologically infeasible. Finally, additional flexibility is available under 6(d) of the Act that permits employers to request a variance from the required means to achieve compliance. Thus, under the present methods of compliance requirements in OSHA standards, including those that apply to the Z table substances, employers are already provided a reasonable degree of latitude in using respirators to achieve compliance.

Advantages

Maintaining OSHA's present policy with respect to compliance methodology will ensure the greatest degree of health protection to employees. Available evidence, as discussed above, demonstrates that in almost all cases engineering controls provide far superior protection against exposure to toxic substances than do respirators. To continue this policy would be in concert with the Acts mandate that the Agency"...assure so far as possible....healthful working conditions...."

Disadvantages

Maintaining the present policy may be perceived by employers as continuing an unnecessary cost imposition. OMB will also object. The present policy, however, is supported by available data as being appropriate, is consistent with the Act, and given the flexibility in OSHA's enforcement posture, does not impose the unreasonable burden that is perceived by some.

B. Alternative Actions

1. Propose to revise OSHA's policy as it applies to the 1910.1000 Z table substances and 1910. 134.

A revised policy on methods of compliance could be applied to the air contaminants listed on tables Z-1, Z-2, and Z-3 of 29 CFR 1910.1000 and to the requirement for primary use of engineering controls found under 29 CFR 1910.134, OSHA's Respiratory Protection Standard. Such actions may provide relief to employers currently required to implement engineering controls to comply with PEL's that were adopted without the benefit of scrutiny by 6(b) rulemaking.

The rulemaking to revise the existing policy would need to define the conditions under which respirator use may be considered as an acceptable alternative to engineering controls. These conditions can vary substantially from one substance to another and from one workplace to another. The rulemaking would need to specify the extent to which employers will be required to justify the use of respirators rather than engineering controls. For example, where an employer desired to abandon or compromise the use of the engineering controls as the primary means of protection, the employer might be required to submit to OSHA a detailed plan setting forth how respirator use would be implemented and how the effectiveness of the program would be evaluated. The concurrence of the employee representative might also be required. Such a "plan" concept would be extremely taxing of OSHA's compliance resources. To have a chance of success, from either a rulemaking or enforcement perspective, this concept would have to be implemented on a very small scale, probably to a limited number of relatively low-hazard substances. This type of system, albeit unique, is currently in effect with respect to the enforcement of OSHA's noise standard, relying on a court of appeals decision to permit more expansive use of personal protective equipment (see attachment).

Monitoring the effectiveness of personal devices to protect against noise exposure can be achieved readily through audiometric testing which is required by the standard. However, since there are no practical methods for measuring contaminant levels inside respirator facepieces on a routine basis under workplace conditions, and since there is no biological index to indicate whether or not the respirator has performed well, the absence of such circumstances which make such a program feasible for the noise standard, would make it extremely difficult to apply to exposure control plans established to protect against toxic substances.

Such plans would be required to include a comparison of the relative degree of protection afforded by engineering controls and respirators in the workplace, the basis for selecting the particular type of respirator chosen, and the impact of the use of respirators upon employees. The final standard, if possible to develop, would be a comprehensive treatment of the subject which would provide guidance to employers involved in selecting the appropriate method of compliance to be used. —

2. Propose to revise OSHA's policy as it applies to 6(b) standards:

A revised compliance policy could also be applied to existing and future 6(b) standards. With respect to existing standards, this would require reopening the record of each 6(b) standard that has been promulgated. Moreover, reopening these rulemakings would constitute an enormous endeavor that again would address the second most important issue in each of these former rulemakings. (The appropriate use of respirators has been an issue during each previous 6(b) rulemaking.) The record for each of these proceedings has demonstrated that respirator use is appropriate in very limited circumstances.

Future 6(b) rulemakings will, as a matter of course, scrutinize the issue of respirator use. It appears logical, therefore, that permissible compliance methods should be determined in each new 6(b) case during which the substance-using industry will be closely examined. If a revision of 1910.1000 were made to permit more flexibility, such a provision could also be proposed, if appropriate, for each 6(b) rulemaking. It is important to recognize that the record in each case would determine the final outcome and to the extent that the proposal is inconsistent with prior 6(b) rules in this regard, the difficulties of sustaining such changes are magnified.

3. Review the policy for each of the Z-table substances on a case-by-case basis

The Regulatory Flexibility Act requires that substances regulated by OSHA be reviewed on a regular basis. Since toxicity among regulated substances varies greatly, and since the risks associated with a toxic substance can be balanced against the need for compliance flexibility, addressing the issue of engineering controls and respirators as methods of compliance as each substance is reviewed may be appropriate. The disadvantage to this alternative is that it will be a lengthy process to cover all of the over 400 chemicals listed in 29 CFR 1910.1000.

4. Develop a compliance directive or non-regulatory methods-of-compliance policy that would allow for a more flexible enforcement posture.

Another alternative is for OSHA to handle this issue through non-regulatory action by developing a new general methods-of-compliance policy. This could be published as a compliance directive to address the question of when to allow the use of respirators instead of engineering controls. This would clarify OSHA's enforcement posture and define employer compliance flexibility in specific situations possibly by listing instances where respirator use is generally acceptable. Changes and revisions to the policy would allow OSHA to respond to changing control technology and industrial conditions. Although this alternative may appear to be administratively attractive, it is questionable on legal grounds. That is, this action may be perceived as changing regulations by compliance directive and may result in litigation.

ITEMS TO BE CONSIDERED FOR ALTERNATIVE ACTIONS:

If any of the options described above are pursued, other than the recommended option, the following major topics should be addressed:

1. Selection of Method of Compliance. OSHA would need to determine the extent to which employers would be permitted to select their own degree of respirator use.

2. Justification of Specific Selection of Methods of Compliance. OSHA would need to specify the extent, if any, to which employers should be required to justify the use of respirators rather than engineering controls and would have to meet criteria for acceptance of the use of respirators in place of engineering controls.

3. General Applicability. It would be necessary to determine if one general rule could be applied to all workplaces and all substances, or whether criteria would need to be established to apply to groups of industries and substances separately. A detailed evaluation would need to be made regarding the relative degree of protection afforded by engineering controls and respirators in different types of workplaces. Existing data indicate that respirators cannot assure the same degree of protection as engineering controls.

4. Other Relevant Factors. These would include consideration of employee resistance to the use of respirators, which would have to be evaluated in terms of the impact on the relative degree of protection.

ANALYTICAL REQUIREMENTS:

To be determined

TIMETABLE:

a) FR Notice of project discontinuation based on recommended option: March, 1987

or b) FR notice of proposed action based on alternative options: June, 1987

AGENCY CONTACT:

Charles E. Adkins, Acting Director
Health Standards Programs
Room N-3718
523-7075

The **Chairman**. Was OSHA strongly recommending to the Policy Review Board that the agency should not proceed with the next step in rulemaking, which would have been to publish the proposal?

Dr. **Weiner**. That is correct.

The **Chairman**. As far as the recommendation, it was to maintain OSHA's current policy; that was your recommendation?

Dr. **Weiner**. That's correct.

The **Chairman**. Okay. Now, were the recommendations approved by the Policy Review Board?

Dr. **Weiner**. No, they were not.

The **Chairman**. Why did they not accept OSHA's recommendations?

Dr. **Weiner**. I believe that they felt that more flexibility in method of compliance was called for, and in addition, they did not accept our evaluation of the record.

The **Chairman**. Well, did you then send any additional information to the Policy Review Board?

Dr. **Weiner**. Yes. We prepared an extensive summary of not only the record existing as a result of the comments to the ANPR, but also of every rulemaking record that OSHA had done in which the issue of methods of compliance was discussed.

[Information supplied follows:]

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

INTERNAL DOCUMENT NOT RELEASABLE
UNDER FOIA

MEMORANDUM FOR: POLICY REVIEW BOARD

FROM: JOHN A. PENDERGRASS
ASSISTANT SECRETARY

SUBJECT: Addendum to the Options Memorandum Concerning Revision to the Methods of Compliance Requirements in Meeting OSHA's Permissible Exposure Limits.

The following information is being provided to clarify the Options Memorandum and supply additional information as requested by the PRB. This addendum addresses two subjects:

(1) The directive from the President's Task Force on Regulatory Relief, dated March 25, 1981, (Appendix I) requiring OSHA to review its policy on the use of personal protective devices.

(2) Data and views in OSHA rulemaking records addressing the methods of compliance issue (Appendix II).

1. The President's Task Force on Regulatory Relief.

On March 25, 1981, the Vice President issued a statement that the President's Task Force on Regulatory Relief was "releasing a list of existing regulations that various agencies will be reassessing and possibly modifying." One item among the list of "Materials on President Reagan's Program of Regulatory Relief", released on June 13, 1981, dealt with OSHA's policy on the use of personal protective devices. It appears that the Task Force was concerned that OSHA's policy of specifying control by engineering means rather than by personal protective equipment was implemented without regard to the degree of risk of the hazard, cost, or cost-effectiveness. The Task Force statement was as follows:

> Although OSHA does not have a published comprehensive policy on personal protective devices apart from its individual rulemakings on specific occupational hazards, OSHA has consistently adopted a policy of requiring engineering controls first and personal protective devices only when engineering controls are not feasible or as supplements to engineering controls. This policy has been implemented regardless of the degree of risk of the hazard (carcinogens were treated the same as cotton dust or noise)

and regardless of the costs. A policy that simply set performance standards, allowing employers the option of using personal protective devices where they are as effective as engineering controls, might be more cost-effective and ultimately more beneficial to workers and society.

It is true that OSHA's compliance policy has been implemented regardless of the degree of risk of the hazard posed by the toxic substance. The Occupational Safety and Health Act requires, within the legal constraints of significant risk and feasibility, the promulgation of the most effective protective measures to assure that employees will not suffer impairment of health from exposure to a toxic substance. A standard may not afford less than full protection even if the regulated risk is not, for example, life-threatening. Moreover, the compliance issue pertains only to ways to achieve the PEL, and should in no way be related to the issue of health risk. This is so because the degree of risk is properly taken into account in establishing permissible exposure limits. That is, the more toxic the substance, the lower the PEL will be.

Thus, although the example given by the Task Force, that the compliance policy treats exposure to carcinogens and cotton dust the same, is true, it is not a "method-of-compliance" issue.

The Task Force urges OSHA to allow ". . . employers the option of using personal protective devices where they are as effective as engineering controls, might be more cost-effective and ultimately more beneficial to workers and society". The Task Force here has gotten to the heart of the issue. Permitting the use of respirators in instances where they are shown to be at least as effective as engineering controls may be justified. Data in the record as referred to in the Options Memorandum and as amplified in this Addendum, however, do not demonstrate the equivalence of the two control means.

Although two field studies in the record (Exs. 2-67, 38-7) did claim an adequate degree of effectiveness when using respirators in specific operations, they do not provide a broad enough scientific basis for a policy change in all of industry with respect to the adequacy of respirators. Although it might be concluded from these studies that successful respirator performance in these specific instances should serve as the basis for a change in OSHA's policy with respect to general industry, a far greater body of field work found in the record clearly shows this to be an unrealistic and inappropriate conclusion. As discussed in the Options Memorandum and later in this Addendum, respirators have not been shown to be at least as effective as feasible engineering controls for any practical widespread application in general industry. Though employers have argued the contrary, the comments in the record in support of their assertions are at best, unconvincing. Moreover, technological equivalence is not the only consideration. The burden of primary responsibility for a healthful workplace that is placed on the employee who uses a respirator is great. OSHA has addressed this issue in the preamble to the Cotton Dust standard. The Agency's conclusion during that rulemaking was that " . . . it is not appropriate to place the burden of compliance principally on the employee, as would be the case if respirators were the principal means of reducing employee exposure" (43 FR 27384). The preponderance of evidence demonstrates that the opportunity for failure of exposure control based on a respirator program generally exceeds that of control based on engineering controls. As pointed out during almost every OSHA toxic substance rulemaking, there are numerous elements that must be stringently attended to in order to result in an acceptable respirator program. These elements include proper and continuing evaluation of exposure conditions, selection of the correct respirator, ensuring proper field fit, ensuring continuous and proper respirator use, maintenance, inspection, quality assurance, evaluation of the work environment on respirator function, and evaluation of human factors such as worker acceptance, comfort, and morale. Inadequate exposure control results when any of these program elements are improperly administered. Data in the record and industrial hygiene experience, discussed in the next section, indicate that the complexity that is involved in achieving successful exposure control with respirators simply may overwhelm even conscientious efforts in administering a respirator program. The validity of this assertion is strengthened by the fact that there have been no widespread common situations in general industry that have been pointed out to OSHA where the application of respirators has or will result in exposure control at least as effective as that provided by feasible engineering control.

The final point made by the Task Force is that personal protective equipment should be permitted where its use in controlling exposure may be cost-effective. OSHA agrees that the least costly control measure that effectively attains the desired health or safety goal should be permitted. Directed by EO 12291 to prescribe, in its regulations, the least costly alternative to achieve a regulatory objective with respect to controlling exposure to PEL's, the Agency in all its rulemakings has considered both respirators and engineering controls. Though there are instances where respirators appear to be a less costly control means, they have also been shown to be less effective in consistently achieving on a widespread basis the objective of meeting PEL 's. Thus, for the purpose of establishing a methods of compliance policy applicable to general industry, respirators have not been shown to be a cost-effective alternative to engineering controls.

The following summary of exhibits from OSHA's Methods of Compliance docket and other OSHA records (appended) demonstrates that the requirement in the Task force statement that personal protective equipment be as effective as engineering controls before a general policy be established in favor of respirator use, cannot, in general, be met.

2. Data in OSHA Records Addressing Methods of Compliance.

Numerous commenters in OSHA's 6(b) rulemaking records have expressed a preference for more flexibility in OSHA's compliance policy. The assumption behind this assertion, however, that employee protection would not be compromised by greater reliance on respirators in lieu of feasible engineering controls, is not supported by substantial evidence in any of the OSHA rulemakings addressing the methods of compliance issue. On the contrary, data in these records demonstrate that, as a general proposition, less confidence can be placed in respirators performing as expected, than can be placed in the expected performance of feasible engineering controls.

Rulemaking dockets, in addition to the Methods of Compliance docket, containing data on the compliance issue include those for standards on benzene, inorganic arsenic, cotton dust, acrylonitrile, cancer policy, lead, ethylene oxide, and asbestos. In each of these rulemakings, available data led OSHA to conclude that exposure control should be achieved primarily through implementation of feasible engineering methods, and supplemented where necessary by the use of respirators. A discussion of the data in these records is appended to the following review of the data in the Methods of Compliance docket.

METHODS OF COMPLIANCE ANPR DOCKET

The exhibits cited below are found in the Methods of Compliance Docket Number H-160, unless otherwise noted.

There are numerous industry commenters who favored a more performance oriented compliance approach, despite the fact that a number of the same commenters acknowledge that engineering controls are inherently more effective than respirators in providing protection against occupational exposure to toxic substances (Dow, Ex. 2-71; American Gas Association, Ex. 2-77; Monsanto, Ex. 2-88). In addition, with the exception of data provided by DuPont (discussed later, Exs. 27-1 and 38-7, Docket H-33) these commenters did not provide any substantive data that would indicate to OSHA that respirators are at least as effective as engineering means in achieving compliance with PEL's. The data do not convince the Agency that confidence can be placed in the consistent reliability of respirators as a primary exposure control method. On the contrary, the data show a high degree of variability in respirator performance. Moreover, the data clearly show that feasible engineering controls are far superior in achieving and maintaining the desired level of protection. The discussion below sets forth representative comments of those favoring modification to OSHA's policy.

Cooper Industries (Ex. 2-52) stated:

> To catagorically refuse to recognize the use of appropriate personal protective equipment (e.g., respirators) as an acceptable control measure is also considered unenlighted. The argument that the use of personal protective equipment to control employee exposure is inherently flawed because it requires the cooperation of the employee to be successful is ludicrous. The days of viewing employers as "feudal lords" who have the sole responsibility for the well being of their "serfs and vassals" (i,e., employees) is no longer acceptable. The employees have to begin the realize that they have a major responsibility to protect their own health - and it is a responsibility that they cannot continue to shirk. On the one hand, employee representatives are demanding better employee training, access to records and improved product labeling, while on the other hand, stating that the employees should not be forced (in the face of discipline) to wear appropriate personal protective

> equipment to reduce their exposure because it is too uncomfortable or inconvenient and not the employee's responsibility. Rather they contend that the employer should be required to design engineering controls, at any cost, which will, in fact, protect the employee in spite of himself. This idea is simply unacceptable because the preservation of an employee's health must be a mutual effort. Both parties must be held accountable for their actions or lack of action - not just the employers who are viewed as the party most easy to regulate and fine for enforcement purposes.

Cooper Industries did not provide any data to support their assertion that it is considered unenlightened to not view respirators as an acceptable control measure. In addition, data were not provided that demonstrated that a successful respirator program was simply dependent upon employee cooperation. As pointed out in the Options Memorandum and all of OSHA's rulemaking records on toxic substances, there are numerous elements in a respirator program that must be attended to in order to achieve the desired result. A successful respirator program depends largely on management commitment, training, and continuous monitoring of proper respirator use. While many employers do exercise such commitment, OSHA's citation record (Exhibit 33-5, Docket H-049) shows that a very large number do not. For example, in the period Fiscal 1977 through 1982, of inspected worksites where respirators were used to provide protection from a documented excessive level of air contaminant, 59% had deficiencies in at least one respirator program area. Many violations were of the type that have been shown to lower the level of protection provided by the respirator. Frequently cited major program violations included respirator fit, respirator condition, unapproved or unsuitable respirator, and lack of continuous wear. One commentr, ALCOA, estimates that improper wearing of respirators occurs 30% or more of the time in industry (Ex. 2-103). Further, medical problems and other specific situations may preclude successful use of respirators (2-131, 2-81, 2-120, 2-128, 2-129, 2-114, 2-103, 2-132). It was also pointed out that the true performance of respirators in the workplace is always indeterminate during the actual use period (2-131). Finally, the unpredictability of the protectiveness of respirators during field use is demonstrated in studies discussed later in this section. (Exs. 27-2, 27-4, 27-9, 27-10, 2-64,) and (Exs. 38-2, 38-3, Docket H-033).

The Refractories Institute (Ex. 2-130) made the following statements:

> . . .The use of engineering controls or respirators should be evaluated on their merits in each situation.
>
> . . .TWO FACTORS indicate that respirators better protect employee health. The FIRST is that the employee is protected at all times and in all places the respirator is worn; whereas, engineering controls tend to be localized in their effectiveness.
>
> . . .SECOND, the employee is better protected with respirators over the course of his work day than with engineering controls.
>
> . . .With over 200 plants in 37 states, there exists varied differences in temperatures and humidity in refractories manufacturing facilities. Reports available in engineering journals have shown that engineering controls, especially bag house dust collectors, are more sensitive to loss of effectiveness, due to changes in temperature and humidity than are respirators.

With regard to this comment, it should be noted that no data were provided that demonstrated the contention that "the employee is better protected with respirators . . . than with engineering controls."

The commenter's assertion that the employee is protected at all times when the respirator is worn skirts the basic issue of whether the degree of that protection is acceptable. Data from field studies discussed later in this Addendum demonstrate that the protection afforded by respirators is highly variable and very often does not achieve the desired or expected level of exposure control. No data were provided by the Refractories Institute that show that the degree of protection would be adequate if respirators were to be used as they suggest. The second point made by this commenter, that the employee is better protected with respirators, was not substantiated in the submission. In view of expert opinion to the contrary, stated later in this Addendum, it is impossible for OSHA to accept the validity of this assertion.

The statement that in some situations engineering controls are more sensitive to loss of effectiveness than respirators is another unsupported assertion. The commenter did not provide data illustrating such situations. With regard to effectiveness, it should be noted that the level of performance of engineering controls can be readily monitored, and needed corrective action can be taken in a timely manner. The degree of respirator effectiveness, however, during actual use cannot be readily monitored. Thus, it is usually the case that respirator failure is not detected, whereas engineering control failure is.

Union Carbide (Ex. 2-119) asserted that:

* * *

> OSHA should not require the use of engineering controls in preference to the use of respirators and, in general, should not require the use of a specific control strategy in preference to other control strategies. Each occupational situation poses a unique set of factors that must be considered in order to determine the appropriate control methods. Such factors include: the duration of the job; the number of employees exposed; the level of exposure; the route of exposure; the chemical properties and the physical state of the material; the charateristics of the process (e.g. automated versus manual operations; open versus closed systems); and the work pattern of the employee (e.g. fixed work station versus mobile work routine). For each exposure situation, each of these factors will carry a different weight in terms of influencing the control strategy ultimately chosen. Those factors most heavily weighted for the particular situation will determine the most effective control strategy. For example, jobs with high variability, moderate exposure on a intermittant basis and involving manual operations performed by a small population are often most effectively controlled by the use of respiratory protection and employee work practices due to the impossibility of predicting with certainty every conceivable situation that may arise.

* * *

> OSHA should not be concerned with whether or not respirators provide the same degree of protection as engineering controls, but should be concerned with whether or not a control method actually employed adequately reduces the exposure and prevents the occurrence of adverse health effects.

The Union Carbide statement, again is an example of an argument for more flexibility which lacks supporting data. Union Carbide argues that OSHA should only . . ."be concerned with whether or not the control method actually employed adequately reduces the exposure and prevents the occurrence of adverse health effects". OSHA agrees. Respirators, however, have not been shown to be such a method for routine use as a primary control method that can be adopted as OSHA's broad policy for application in general industry. It would be more appropriate to make this determination in specific 6(b) rulemakings.

The Tex-Ark Joist Company (Ex. 2-133) offered the following:

> We emphatically believe that the policy of requiring engineering control over respirators is too inflexible and compels employers to unnecessarily expend vast sums of money to achieve levels of health protection which could be achieved with far less expense. In light of the punishing recession which has gripped the nation's economy in the last several years, we believe that the elimination of such costly regulatory standards is critical.
>
> * * *
>
> One of the initial questions which the agency has posed concerns what factors indicate that respirators in the work place provide better protection of employee health. In the first place, experience demonstrates that it is often impossible to predict the performance of engineering controls at the design stage. Moreover, in many instances, feasible engineering controls cannot reduce air contamination to acceptable levels on a consistent basis. This is because it is often difficult consistently to maintain the precise operating conditions which will afford the desired level of protection.
>
> By and large, no matter how carefully a company adopts engineering controls, which controls can never accommodate all conceivable operational variations, and many such variations can result in exceedences of prescribed standards. By contrast, respirators, if properly worn, can afford a reliable standard of

> exposure regardless of the environment surrounding employees. Respirators, therefore, are generally to be favored over engineering controls because they usually possess (1) a predictable level of protection, (2) a consistent level of protection, (3) mobility, and (4) lower cost.
>
> The cost differences between engineering controls and personal protective equipment which achieves the same level of employee protection can be staggering.
>
> * * *
>
> If a respirator program will achieve the necessary level of employee protection then in general, it should be favored over the implementation of engineering controls regardless of whether such controls would partially or even fully achieve compliance with applicable standards.

OSHA would be willing to consider the comment that respirators might be preferable to engineering controls in some cases if "a respirator program will achieve the necessary level of employee protection." However, no specific information was provided by Tex-Ark that would describe situations where respirator programs will achieve the necessary level of protection.

This commenter asserts that respirators are preferrable because they posess a predictable and consistent level of protection whereas engineering controls do not. Data in the record point to the contrary. As discussed later, the level of protection afforded by respirators is highly variable, inconsistent, and cannot be monitored during use. Engineering control performance, in fact, can be predicted at the design stage and can be readily monitored when in use. Thus, as is not the case with respirators, it will be known if engineering controls begin to fail to limit exposure to the desired level. Where this is the case, corrective measures can be taken, including attempting to minimize the hazardous exposure condition by supplemental use of respirators. The important point here, is that it can readily be determined if engineering controls are not performing properly. Such is not the case when respirators perform improperly. Moreover, the specific studies and data cited later in this Addendum provide substantial evidence that the claims of respirator effectiveness made by Tex-ark are contrary to fact.

1. The control measure must reduce exposures below an applicable safe limit.
2. The method must be reliable.

When these two criteria are met, factors such as logistics, product quality, economics, morale, and efficiency can be incorporated into the decision logic for choosing an appropriate control strategy.

It is important even in light of the data they cite, to note that Du Pont ". . . recommends that each employee's personal work environment be maintained at a safe exposure level through implementation of cost effective engineering controls, augmented as necessary by personal protective equipment. . ."

The field study cited by Du Pont (Ex. 27-1) did suggest adequate respirator performance. In one study of 11 workers, a half mask respirator met the expected protection factor of 10. Du Pont stated in this study that successful performance can be achieved if respirators are "properly selected and fit-tested using the isoamyl acetate method and used by trained wearers . . ." The respirators in the study were maintained and inspected daily, and the employees underwent initial training and quantitative fit testing and daily qualitative fit testing. In addition, throughout the course of the study, testing personnel followed and observed the actions of the workers as they performed their duties. Thus, an unusally high degree of employee conscientiousness in this case was assured. This study was performed in a carefully controlled environment which cannot be viewed as being typical for respirator usage. In addition, it is important to note that the small study population does not provide for adequate statistical power which would be expected in order for conclusions to be made with respect to the appropriateness of changing OSHA's compliance policy.

Other commenters, though generally acknowledging the preference for engineering controls in many situations, also supported modification of OSHA's policy to allow for more

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[2] Center for Disease Control, National Institute for Occupational Safety and Health; Respirator Information Notice, November 15, 1982, and March 3, 1983.

flexibility. These commenters include DOW (Ex. 2-71), National Agricultural Chemical Association (Ex. 2-76), National Paint and Coatings Association (Ex. 2-78), Monsanto (Ex. 2-88), and the Motor Vehicle Manufacturers Association (Ex. 2-95). Again however, none of these commenters provided supporting data as to the reliability of respirators as a primary means of exposure control.

The following are representative statements that were provided to the record in support of the primacy of feasible engineering controls:

> "Engineering controls should always be given primary consideration." (AT & T, Ex. 2-59)
>
> "Improvements in respirator technology have not overcome their limitations and problems of reliability." (NIOSH, Ex. 2-81).
>
> ". . .The existing priority system works." (Steelworkers, Ex. 2-53).
>
> "Engineering controls generally provide better and more reliable protection. Improper wearing of respirators occur less than 5% of the time at ALCOA. However, at other plants probably 30% or more" (ALCOA, Ex. 2-103).
>
> "There are no published papers or manuals to show significant improvement in respirator technology and application" (Ed Hyatt, Ex. 2-114).
>
> "All industrial hygiene practice indicates feasible engineering controls should take precedence. . ." (Univ. of North Carolina, Ex. 2-120).
>
> "Confidence in engineering controls can be assured by system design, periodic performance checks and maintenance,and workplace sampling. There are more opportunities for loss of protection in the many elements of a respirator program". (Lawrence Livermore, Ex. 2-128).
>
> "Few businesses have the level of commitment necessary to run an effective respirator program." (Virginia State Dept. of Health, Ex. 2-129)

> "With very few exceptions, respirators cannot offer the same degree of protection and reliability as engineering controls. the actual performance of a respirator for a particular use at a specific time and location cannot generally be accurately determined." (Los Alamos, Ex. 2-131)

It is important to note that many of these commenters (Los Alamos, NIOSH, Lawrence Livermore, Ed Hyatt) are impartial recognized experts in the area of exposure control methodology, particularly with respect to respirators, and that they recommend primary reliance on feasible engineering controls. In addition, established industrial firms such as AT&T and ALCOA have years of experience in implementing control technologies for a wide variety of industrial environments.

The point has been made repeatedly in this section that no data were offered in support of placing more emphasis on respirator use. It is important therefore, to review the weight of contrary data that do exist in the record.

A number of studies have been submitted to the record that compare the expected and actual performance of respirators during simulated or real working conditions. The results of these studies, discussed below, provide substantive support to OSHA's position that the performance of respirators during typical work activities is largely unpredictable and unreliable.

Lenhart and Campbell of NIOSH (Ex. 27-2) did workplace performance testing in 1984 in a primary lead smelter for half mask negative pressure air-purifying respirators.

Although the respirators as expected all showed a measurable degree of effectiveness, the important point is that respirator performance showed a high degree of unpredicability and inconsistent results. Thus, although every worker in the study had to achieve a preliminary fit factor of at least 250, in order to participate, only 10 of the 25 workers involved were able to achieve this value in the workplace. Moreover, it was impossible to correlate the workplace protection factors with the preliminary fit factors.

Myers et. al. reported on the performance of two brands of PAPR's also used in a lead smelting operation (Ex.27-4). The assigned protection factor for each PAPR was 1,000. For one model, 24 measurements showed actual protection factors ranging from 32-1,016, with a geometric mean of 205. For the other PAPR, 24 measurements showed actual protection factors ranging from 28-5,500 with a geometric mean of 165.

It is clear from the results of this study that the respirators were not providing the expected protection. Moreover, the wide variability in actual protection afforded lend support to OSHA's belief that little confidence can be placed in estimates of respirator performance in the field.

Moore and Smith (Ex. 27-9) reported that for 81 tests taken on 3 models of half mask respirators used during copper smelting, the expected protection factor of 10 was not achieved 38% of the time for mask A, 30% for mask B, and 56% for mask C. This study again demonstrates the unreliability of respirators in achieving the expected degree of exposure control.

Myers and Peach of NIOSH (Ex. 27-10), reported workplace protection factors for half mask and full facepiece PAPR's used in a silica bagging operation ranging between 16 and 215, with a geometric mean of 54. The assigned protection factor for the PAPR's was 1,000. Simulated workplace protection factor tests were also performed in this study using free standing PAPR's mounted on air filtering heads, and the resulting workplace protection factors ranged form 302 to greater than 2075. A reason given for the low protection factors found with the workers was that bumping of the filter and motor caused leakage past the filter grommets. Also cited was inadequate respirator facepiece fit under actual working conditions, causing leakage past the facepiece seals. The data also suggested that under moderate to heavy user work rates the migration of contaminant into the facepiece due to overbreathing the PAPR system could be a significant source of leakage. The results of this study are important in that work activities undertaken while using the respirators would be typical in many circumstances. The factors affecting respirator performance (bumping, facepiece fit) in this study would also come into play in other industrial settings.

Johns Hopkins (Ex. 2-64) cited field studies on the effectiveness of half-mask respirators assigned a protection factor of 10. Although in one study, a single use disposable respirator with an assigned protection factor of 10 achieved a median protection factor of 22 in a cotton mill, in other studies the results were worse. In coal mining, the median workplace protection factor was 3.2, in smelting 40% of the protection factors were below 10, spray painting averaged 3.21 and for cadmium operations the median workplace protection factor was 4.0.

In a shipyard operation, an air supplied helmet with expected protection of 1,000 achieved protection factors ranging from 1.9-3, 750 and averaging 24.5. The results of these studies again show inadequate and highly variable respirator performance.

NIOSH (Ex. 38-2, Docket H-033) reported on the effectiveness of a disposable particulate respirator with an assigned protection factor of 10. For 6 workers involved in the manufacturer of a concrete patching compound studied over three days, actual protection achieved for days one, two, and three for each worker were: 12, 6.7, 74; 42, 37, 8.2; 1.6, 34, 140; 34, 50, 4.4; 7.9, 12, 9.4; and 23, 4.8, 42. NIOSH calculated from this that 95% of workplace protection factors would be expected to be at or above 3, 87% at or above 5, and only 70% above 10. This study again shows an unpredictable level of protection achieved with respirators, with a significant percentage failing to achieve the desired degree of control.

Barbara Skaggs and John Lioble of the Los Alamos National Laboratory performed a study of the effects of temperature and humidity on respirators under simulated work conditions. (Ex. 38-3 Docket H-033). They developed simulated work factors (fit factors measured in an environmental chamber for subjects performing work type exercises) for two different helmet type powered air-purifying respirators, and a half mask PAPR. The protection factors realized under simulated work activities were less than those attained during pre-work testing. The authors of this study concluded that "there were significant differences between prefit and simulated work factors." Thus, concern over respirator use should be evident since their effectiveness most often decreases during work activities, and continuous monitoring of respirator effectiveness cannot generally be performed under actual use conditions

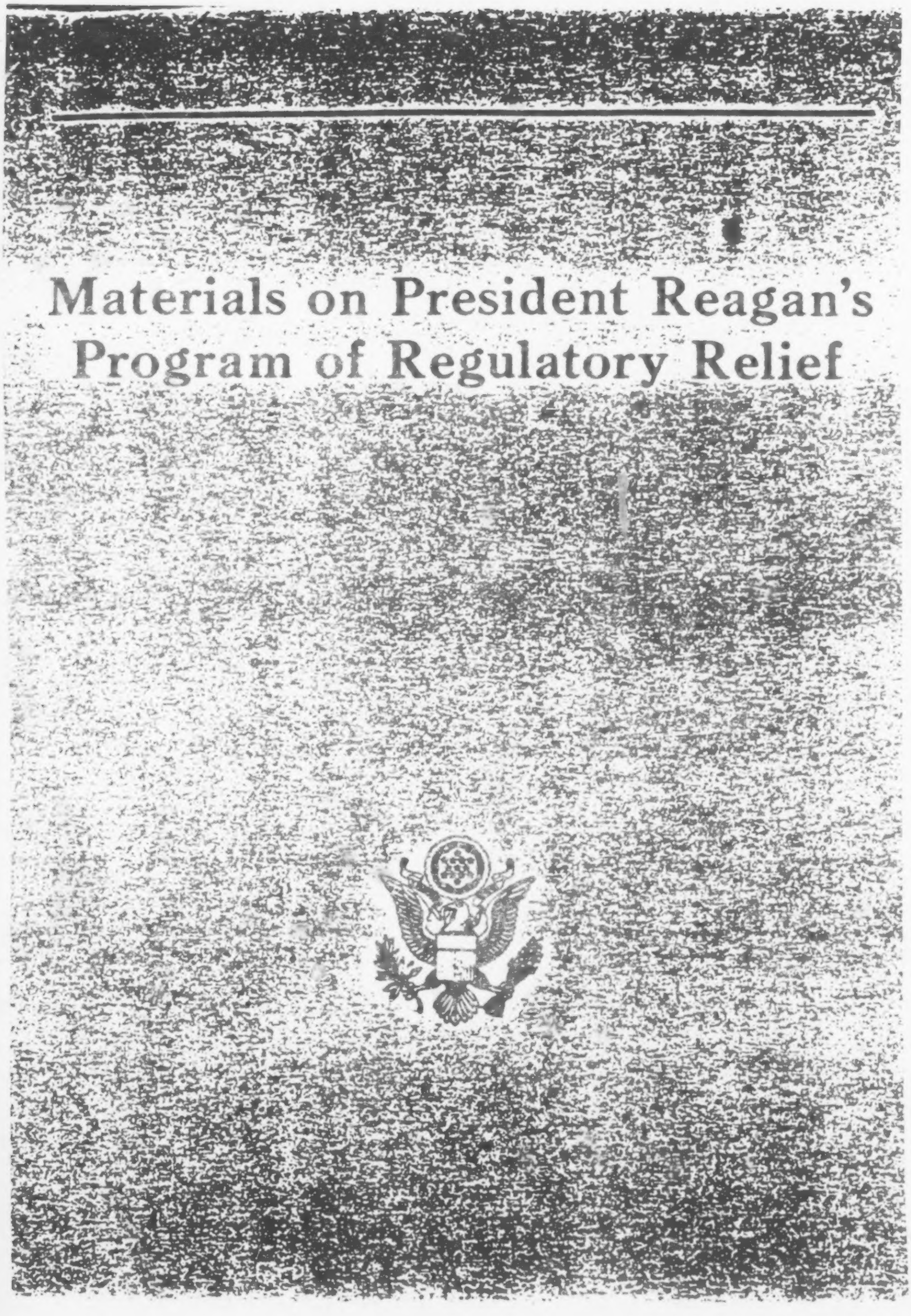
Conclusions

The record does not contain documentation that convinces

OSHA that respirators can be used confidently or reliably as a predictable and consistently successful routine means of meeting OSHA's PEL's. On the contrary, data demonstrate that respirators fall short of these expectations far too often under both testing and actual working conditions. Even though respirators are deficient as a preferable first line of protection against air contaminants, it is important to recognize, as discussed in the Options Memorandum, the fact that the Agency's compliance policy does not mandate the use of engineering controls in all cases. There are recognized situations and conditions, in addition to lack of feasibility, in which engineering controls are not required and in which respirator use is permitted. Each of OSHA's 6(b) standards describes these situations. Thus, OSHA believes that the present methods of compliance requirements in OSHA standards, including those that apply to the substances regulated under section 1910.1000, plus the right to apply for variances when the proposed method can be shown to be as protective as the standing requirement, together provide employers with reasonable and sufficient degree of flexibility.

APPENDIX I

"Materials on President Reagan's Program of Regulatory Relief"



Materials on President Reagan's Program of Regulatory Relief

PRESS RELEASE

THE WHITE HOUSE
Office of the Press Secretary

EMBARGOED FOR RELEASE: 6:00 p.m. E.D.T.
June 13, 1981

STATEMENT BY THE PRESIDENT ON REGULATORY RELIEF

Excessive and inefficient Federal regulations place an undue burden on our society. They limit job opportunities, raise prices, and reduce the incomes of all Americans.

During the Presidential campaign, I promised quick and decisive action. Since taking office, I have made regulatory relief a top priority. It is one of the cornerstones of my economic recovery program.

Thanks to the constructive work of my Task Force on Regulatory Relief, chaired by Vice President Bush, many needless and unproductive regulations have been eliminated. Other officials in my Administration are moving forward with equal vigor and are producing tangible results. Regulatory relief actions to date have resulted in billions of dollars in savings to the American people.

The materials in this volume document some of our progress. But more needs to be done, and will be done. I am confident that the legitimate purposes of regulation can be met at considerably lower costs. We shall not rest until that goal is achieved.

PRESS RELEASE

THE VICE PRESIDENT
OFFICE OF THE PRESS SECRETARY

EMBARGOED FOR RELEASE: 6:00 p.m. E.D.T.
June 13, 1981

CONTACT: Peter Teeley
Shirley Green
(202) 456-6772

STATEMENT BY THE VICE PRESIDENT REGARDING PROGRESS MADE IN ACHIEVING THE PRESIDENT'S GOAL OF REGULATORY RELIEF

This is an appropriate time to give an update on our progress in achieving President Reagan's goal of regulatory relief. Before getting into the specifics, however, it is important to emphasize that this Administration's regulatory relief initiatives, which the President has asked me to lead, are an essential component part of the President's program of economy recovery. The goal is to get this economy moving again -- to create jobs, to reduce inflation, and to increase the incomes of all Americans.

With the help of Congress we are achieving real success with the President's budgetary proposals. We need the tax program as well -- to provide incentives for consumers to save and for businesses to invest. We need regulatory relief, and we are all working toward that end. And finally, we need a sound, stable monetary policy, one that will reduce uncertainty and restore credibility to our monetary system.

We are releasing today several documents relating to regulatory relief. The first, entitled "Summary of The Reagan Administration's Regulatory Relief Actions," was prepared for the Presidential Task Force On Regulatory Relief by the staff of the Office of Management and Budget. This report concludes that the more than 180 regulatory relief initiatives announced thus far by the Administration will generate significant savings for the American people. Although these figures are fairly rough estimates, they show potential one-time savings of as much as $15 to $18 billion, with annual savings approaching $6 billion. I should emphasize, however, that this is only the beginning. Our purpose in putting this together is as much for our own use as for the public. One thing we want to make sure of is that we are making progress now and will continue making progress in the future.

Second, there are two other analyses -- one on the President's sixty-day regulatory postponement, and another of the first one hundred days of Executive Order 12291. Partly as a result of the postponement, there has been a notable reduction in the size of the Federal Register during recent months. The average size of the Register is down one-third, and the number of proposed rules has been cut roughly in half. Agencies are responding well to the Executive Order, and I believe that we now have in place a reasonably well-functioning process for the review of new and existing regulations.

Third, we are releasing a set of guidelines to agencies concerning the Regulatory Impact Analyses which they are required to prepare for major rules and regulations. This is an effort to flesh out the requirements listed in the Executive Order. It should be noted, however, that these are interim guidelines and may be amended depending on further experience under the Executive Order and suggestions coming from the agencies and others who make use of the system.

Fourth, we have compiled a set of information entitled, "Materials on President Reagan's Program of Regulatory Relief." This is a collection we put together for purposes of better explaining the President's program and for providing relevant materials to those in the press. We plan to mail this volume to some 3,000 reporters, editors, and others in the media, and shall make it available to others who show an interest.

Two other points should be made. First, the President has asked the Task Force to review pre-existing White House regulations -- that is, the hundreds of Executive Orders that are currently in effect. We have discovered that many of these are no longer relevant, some have been ignored for years, and others are plainly counterproductive to the kind of regulatory relief we are trying to achieve. We have begun a process of winnowing these down and expect to complete the process over the next few months.

Second, the Task Force and its staff are working actively with those in the Congress to achieve legislative change in the regulatory area. Of obvious importance is the initiative to reform regultory procedures being addressed by Senator Laxalt, Senator Leahy, Senator Roth, Congressman Danielson, Congressman McClory, and others. Of equal importance is the Clean Air Act. The Administration is developing a position on amendments to the Act under the leadership of Anne Gorsuch, the new Administrator of the Environmental Protection Agency. The Task Force, the Cabinet Council on Natural Resources and Environment, and others in the Administration expect to review Ms. Gorsuch's recommendations in the near future, and we look forward to working with Senators Stafford and Randolph, Congressmen Dingell and Broyhill, and others in achieving needed corrections to the Clean Air Act.

Finally, an expression of sincere appreciation is owed by me to those in the private sector and those in government who have contributed so much to getting this regulatory relief program off to such a good start. We have received hundreds of substantial responses to my letter of March 25. Moreover, agencies have been enthusiastic about this program, and all have indicated timetables for completion of the analyses of existing rules that I announced on March 25. With this degree of cooperation, I am sure we will fulfill the President's pledge to achieve significant regulatory relief.

# # #

March 25, 1981

EXISTING REGULATIONS TO BE REVIEWED

DEPARTMENT OF AGRICULTURE

1.	Mechanically processed (species) product	The Department of Agriculture has established, by regulation, requirements for the production, use and labeling of mechanically processed (species) product (a meat food product resulting from the mechanical separation of bone and skeletal muscle), and the labeling and preparation of products in which it is used as an ingredient. The regulations' primary impacts are on processors of the product and processors and consumers of products in which it is used. A review of the regulations will determine whether modifications would result in higher net benefits to processors and consumers.
2.	Marketing orders for fruits and vegetables	Regulations issued to implement fruit and vegetable marketing orders have a direct impact on both producers and first handlers by specifying the quality of the regulated commodities to be marketed, the quantities to be marketed on a scheduled basis within a season, or the outlets into which a seasonal crop may be marketed. Orders also may provide for establishment of a reserve pool whereby supplies in excess of marketing requirements must be set aside for later sale. In addition to meeting the marketing regulations, handlers also must finance the local administration and any research or promotional activities under the programs. A review of fruit and vegetable marketing orders will focus on the programs' effects on economic efficiency, costs and productivity.

21. Personal Protective Devices	Although OSHA does not have a published comprehensive policy on personal protective devices apart from its individual rulemakings on specific occupational hazards, OSHA has consistently adopted a policy of requiring engineering controls first and personal protective devices only when engineering controls are not feasible or as supplements to engineering controls. This policy has been implemented regardless of the degree of risk of the hazard (carcinogens were treated the same as cotton dust or noise) and regardless of the costs. A policy that simply set performance standards, allowing employers the option of using personal protective devices where they are as effective as engineering controls, might be more cost-effective and ultimately more beneficial to workers and society.
22. OSHA Carcinogen Policy	The Cancer Policy does not regulate specific chemicals nor require their regulation. Instead, it explains how OSHA will regulate carcinogens in the future. It is intended to streamline the regulatory process, thereby conserving the resources of both the Agency and affected industries, as well as providing greater protection to employees. It is also designed to assist industries' long-term planning by giving them notice of how regulation would proceed. The policy achieves these goals by establishing (1) the evidentiary criteria by which OSHA will conclude that a substance causes cancer; (2) a system for establishing priorities; (3) rulemaking procedures, including limitations on the issues which can be raised; and (4) certain substantive requirements which must be incorporated into future regulations of Category I carcinogens, most notably that employee exposure must automatically be reduced to the lowest feasible level (i.e., through engineering and work practice controls). The policy specifically rejects the use of cost-benefit analysis in setting exposure levels.

OFFICE OF MANAGEMENT AND BUDGET

23. Urban/Community Impact Analyses	This OMB Circular (A-116) requires agencies to conduct analyses to identify the likely effects of proposed major programs and policy initiatives on cities, counties and other

APPENDIX II

Data in OSHA Rulemaking Records Regarding Methods of Compliance

APPENDIX II

A number of commenters in each of OSHA's 6(b) rulemakings did urge the Agency to permit greater reliance on the use of respirators in achieving compliance with the PEL for the substance at issue. For the most part, however, the basis for these comments was that feasible engineering controls were not available for compliance with the PEL in the particular commenter's workplace, or for compliance during certain specific operations during which the substance was being used. OSHA was able to identify, during these substance specific rulemakings, instances where it was believed that implementation of engineering controls was not feasible and that reliance on respirators was necessary. For example, specific allowances for respirator use can be found in standards for asbestos (spraying, demolition, or removal), arsenic (maintenance and repair), lead (for employees exposed less than 30 days per year), coke ovens (maintenance and repair), cotton dust ("blowdown"), DBCP (maintenance and repair), acrylonitrile (maintenance, repair, and vessel cleaning), and ethylene oxide (collection of quality assurance samples, removal of biological indicators, loading and unloading of tank cars, changing ethylene oxide tanks, vessel cleaning, and maintenance and repair activities).

It is important to note that the decision to allow the use of respirators in lieu of engineering controls in these instances was based on data relating to feasibility, and not on data relating to comparability of effectiveness. As with the Methods of Compliance docket, these substance specific dockets contain no data to support the assertions that respirators can generally be an effective substitute for engineering controls. Moreover, the focus of the comments during these rulemakings was on the compliance strategy with respect to the specific industry using the substance in question, rather than on OSHA's compliance policy in general.

OSHA was able to provide specific allowance for respirator use, as noted above, only because of the availability of in-depth feasibility data on the specific industries affected by the rulemakings. The data in these records do not demonstrate that it would be appropriate to extrapolate these conclusions to other industries. Indeed, the only quantitative data found in any of OSHA's records point to the fact that respirator effectiveness cannot be verified in the workplace.

Except for three clarifying Notes in the text, all material which follows is direct quotation from the preambles, including quotations from commenters, as found in the respective FR publications. Each of these rulemakings led to the adoption of the requirement to implement feasible engineering controls prior to reliance on respirators.

ASBESTOS

The final asbestos standard published June 20, 1986, requires implementation of feasible engineering controls and work practices to reduce exposures to the new PEL of 0.2f/cc. This final requirement departs from the proposal which would have allowed the use of any combination of controls, including respirators, to reduce exposure from the previous PEL of 2f/cc to the new 0.2 f/cc PEL.

Commenters who endorsed OSHA's proposal to permit employers to reduce exposure below 2f/cc to the new PEL using any feasible combination of engineering controls, work practice or respiratory protection [Exs. 909-166-90-168, 90-170, 90-182, 90-233, 263] emphasized that flexibility will result in better protection. For example, Texaco stated:

> It has been our experience that control methods which are more cost-effective, but equally safeguarding, will be provided when the employer has the flexibility to select the means of controlling exposure. Therefore, we strongly support any feasible combination of engineering controls, work practices, and protective equipment to reduce exposure. . . [Ex. 90-170].

Similarly the Chemical Manufacturers Association commented:

> CMA supports this approach . . . The use of performance-oriented requirements is the key to achieving an effective standard without unnecessary costs and burdens. Performance-oriented rules allow an employer to design and implement a method of compliance which allows innovation and adaption to the particular circumstances presented in a workplace, and permits an employer to avoid the expense of satisfying specifications that are of no value in the particular workplace . . . As long as the employer meets a permissible exposure limit (PEL), controls

> the skin contact, or meets the appropriate biological levels that are consistent with employee health and safety. OSHA should not require any specific control strategy [Ex. 90-166].

W. R. Grace & Company stated:

> Grace supports the concept of allowing any feasible combination of engineering controls, work practice, and personal protective equipment to reduce the exposures from 2f/cc to the new PEL. We believe that such a flexible approach is necessary to achieve any significant degree of compliance with a new reduced PEL [Ex. 90-167].

OSHA agrees that in the abstract, "flexibility" is a desirable compliance goal. However, this record has again convinced the Agency that respiratory protection is inherently less reliable than engineering and work practice controls, and therefore, cannot be granted the same compliance preference, when feasible engineering and work practice controls are available.

Most participants who addressed this issue, including industrial hygiene experts appearing on behalf of government, industry, public interest groups and unions, were opposed to OSHA's proposal to give respiratory protection the same priority as engineering and work practice controls. They affirmed the theoretical and practical superiority of engineering and work practice controls to reduce employee exposure to asbestos. For example, Organization Resources Counselors (ORC), an industry consultant, stated:

> ORC recommends that employers be required to institute engineering controls, to the extent feasible, to control employee exposures to airborne asbestos fibers to or below Permissible Airborne Concentrations (PAC) . . . The priority of control methods required by ORC's recommendation, i.e., use of respiratory protection only as a supplement to engineering controls and work practices or as an interim measure while engineering controls and work practices are being implemented, is consistent with the policy approach taken in all prior air contaminate standards promulgated by OSHA [Ex. 123A].

Representatives of the Asbestos Information Association of North America which represents 52 member companies who mine, mill, and manufacture products containing asbestos, stated:

> . . . The OSHA permissible exposure level (PEL) should be reduced to the lowest level feasible through engineering and work practice controls. Like many other participants in this rulemaking, AIA/NA does not believe OSHA should rely on respirator use when engineering and work practice controls can feasibly achieve the PEL [Ex. 231].

Dr. Morton Corn of Johns Hopkins and the former head of OSHA commented:

> . . . Engineering controls are at the top of the hierarchy of control's because they fail with less frequency than other types of control. Failure of controls are greatest when they are associated with responsibilities placed on the worker minute by minute, hour by hour and day by day. Engineering controls remove this responsibility from the worker and permit he/she to do his /her work effectively without this additional burden. There is nothing reported in either the literature or by word of mouth that suggests valid reasons for departing from using engineering controls as the primary method for controlling asbestos in the workplace [Ex/ 176].

Dr. Held, a consultant in respiratory protection, speaking on behalf of the AFL-CIO, stated with regard to the primacy of engineering controls:

> I can only endorses a position that requires engineering controls, when feasible, to reduce exposures below the established PEL. Respirators should only be used when engineering controls are not technically feasible, while engineering controls are being installed and evaluated, for non-routine jobs (i.e., maintenance work), and for emergencies. This principle has always been maintained by respirator experts and industrial hygienists, knowing that respiratory protection, is not as reliable as engineering controls . . . I do not know of any standard, book , or article written on respiratory protection that does not endorse this basic approach [Ex. 171].

NIOSH and private organizations representing occupational health expertise also endorsed the general primacy of engineering and work practice controls over respirators (see NIOSH, Tr. 6/21; American Industrial Hygiene Section, Ex. 2-126, Docket H-160; American Conference of Government Industrial Hygienist, [E. 2-32, Docket H-160). Reliance on the use of respirators when engineering and work practice controls can feasibly achieve the PEL was also opposed by many unions, such as the United Auto Workers [Ex. 172A], International Union of Electronic, Electrical, Technical, Salaries and Machine Workers [Ex. 90-135] and the Amalgamated Clothing and Textile Workers [Ex. 260].

These general statements of policy preference were augmented by evidence and testimony concerning the reasons for preferring engineering and work practice controls. It is generally acknowledged that protection of the employee is most effectively attained by elimination or minimization of the hazard at its source, which work practices and engineering controls were both designed to do. Industrial hygiene doctrine also teaches that control methods which depend upon the vagaries of human behavior are inherently less reliable than well-maintained mechanical methods. The validity of these generalizations has been borne out by agency experience obtained throughout OSHA"s existence and has been reiterated by a number of professional industrial hygienists for the asbestos rulemaking record [Exs. 171, 176A, 253].

Comments responding to OSHA's proposed methods of compliance requirement for the asbestos construction standard also objected to the Agency's departure from the traditional controls approach [Exs. 123-A; 277; 330; Trs. 6/27, p. 108; 6/27, p. 74; 6/29, p. 17; 7/3, p. 137; 7/3, p. 181; 7/6, p. 5]. The Building and Construction Trades Department of the AFL-CIO argued that by not prescribing specific compliance methods, OSHA was being inconsistent with the intent of Section 6(b)(5) of the Act, and that" . . . OSHA cannot rely on a judgment by the employer as to how best to control occupational exposures to toxic substances, but rather must itself both establish the permissible exposure limits for such substances and set forth specific, objective measures to reduce exposures to or below those limits" [Ex. 330, p. 39]. At the informal hearing, Robert Cooney of CACOSH read the following statement from Robert Georgine on behalf of the BCTD:

> [Using engineering and work practice controls as the primary means of controlling asbestos exposure] must remain the governing principle of an asbestos health standard. OSHA should not allow employers to use personal protective equipment including respirators as a substitute for the former. (Tr. 6/27, p.74).

Richard F. Boggs, Vice President of Organization Resources Counselors, explained the rationals for retaining the traditional hierarchy of controls:

> The rationale behind (the use of engineering and work practice controls before respirators] is based primarily on two principles. One is that protection of the employee is usually most effectively attained by elimination or minimization of the hazard at the source, which work practices and engineering controls are both designed to do. The other is that methods which depend upon human behavior are inherently less reliable than well-maintained mechanical methods. (Ex. 123-A, p. 20].

Mr. Pigg, of the Asbestos Information Association of North America testified at the hearing that the traditional hierarchy of controls should apply to asbestos standards for both general industry and construction:

> AIA/NA fully supports OSHA's efforts to minimize all worker exposures to asbestos to the extent reasonable and feasible, whether such exposures be in the manufacture and installation of new products or in renovation, demolition and other activities where previously-installed products may release fibers. As AIA/NA indicated in its opening comments, the OSHA . . . PEL, should be reduced to the lowest level feasible through engineering and work practice controls. Like many other participants in this rulemaking, AIA/NA does not believe OSHA should rely on respirator use when engineering and work practice controls can feasibly achieve the PEL [Tr. 7/6, p. 5].

CANCER POLICY

One of the few regulatory issues that was resolved in this rulemaking was OSHA's methods of compliance requirements, including the requirement that engineering and work practice controls be used as the primary method of complying with PEL's. Engineering and work practice controls are the only reliably effective means of protecting employees from potential occupational carcinogens. Respirators are relied on only as a means of last resort because they simply do not provide a comprehensive and reliable method of employee protection, are uncomfortable and may themselves create safety and health hazards.

Virtually all industrial hygiene experts appearing on behalf of government, industry, public interest groups and unions, affirmed the theoretical and practical superiority of engineering the contamination out of the workplace, rather than relying on respirators to filter the contamination from the worker's air supply.

OSHA's preference for engineering controls in the abstract was not seriously challenged. What was challenged was OSHA's "generic policy" of preference for engineering controls. The major objections voiced with this policy by participants in this proceeding were that the requirement, when applied to specific industry segments, specific companies, plants, and operations, may prove cost-ineffective, impracticable, and otherwise economically and technologically inappropriate (see e. g. AISI, post-hearing brief; Dupont post hearing brief, NAM). It was argued that OSHA's preference for engineering and work practice controls should be left open to re-examination in each substance-specific rulemaking or be made an option for the individual employers (Dupont, API).

In spite of the general concurrence among knowledgeable health professionals concerning the primacy of engineering and work practice controls over personal protective equipment, a few commenters stated that toxic substances should be controlled through personal protective equipment rather than through engineering controls. Representative comments were:

"Toxic substances in the workplace should be reduced through personal protective equipment rather than through mandated engineering controls." (250-7).

"If adequate surveillance is maintained, the use of personal protective equipment is an effective control measure. An employer should be given the option of establishing a personal protection equipment program and/or work practices control program to minimize the employee's exposure as long as they are equally or more effective than programs based on engineering controls." American Telephone and Telegraph Co., (To same effect, see, e.g., #210, p. 12: FMC Corp. #818).

Another representative comment stated:

"Engineering controls . . . would probably require large dollar expenditures in the form of capital investment and operating expenses . . . OSHA should take into consideration any combination of equipment controls, engineering controls, work practices or personal protective equipment that adequately shields the worker from known or potential carcinogenic substances, rather than legislating engineering controls as the sole protective remedy" (see also #262, p. 7; #208, p. 10).

The above comments are representative of numerous statements in the record. These statement share a number of misunderstandings, as discussed below:

(1). The assumption that personal protection can be as effective as engineering controls is not supportable. No example is given in the hearing record which describes a specific case in which protective equipment is as effective as engineering controls in preventing or providing equivalent reduction in worker exposure. This is due to the intrinsic limitations of respirators compared to engineering controls. OSHA feels that these limitations are such that a control strategy which relies on protective equipment as a primary means of protection cannot be made as effective as a strategy which relies on reductions of emissions at their source as a first line of defense, with personal protection as a backup.

(2). The assumption that personal protective equipment would not continue to play an important role as a second line of defense after the installation of feasible engineering and work practice controls, thus depriving the employer of needed flexibility in devising an overall control strategy, is a misunderstanding of OSHA's intent. OSHA strongly supports the implementation of the most effective personal protective equipment program that is possible, after the implementation of all feasible engineering controls.

(3). The assumption that reliance on engineering controls deprives the employer of necessary flexibility in developing a control technology possibilities. Flexibility is inherent in that there are usually many effective engineering alternatives for solving a given problem.

It is clear that respirators cannot be considered as the primary means of employee health protection. Nevertheless, they do provide some protection and OSHA has concluded therefore that under certain circumstances, the employees must use the respirators provided. Many witnesses support this view (see e.g. Held and Douglas). OSHA witness Bruce Held recommended against respirators as the first line of defense on the basis that:

". . . engineering controls are positive. You know if a ventilation system breaks down; when it happens you will have one or two trained engineers or maintenance people that can take care of it; in the meantime you can evaluate your people. On the other hand, you do not know a respirator leaks until after the man becomes sick" (2785).

He fairly summarized the OSHA position as follows:

"I feel very strongly that (the use of respirators) is the second line of defense and that engineering controls are by far the most effective and preferred method." (Tr. 2683). This position was also supported by industrial hygienists of recognized expertise in industry. For example, Dr. Sowinski of Uniroyal testified that "we adhere to the basic requirements of good industrial hygiene practice, that engineering controls are the best choice." AIHC (Tr. 8399) too "agree (s) that engineering controls should be considered first." Dr. Langner of Dow (Tr. 5118) and Dr. Strassburge of BF Goodrich, among others, also concurred with this position.

Dr. Karrh of Dupont stated that "you would much prefer to have whatever the offending substance is controlled at its source." (Tr. 5365) Other industry witnesses support the superiority of engineering controls and the weaknesses of personal protection (Dr. Thorpe, API, Tr. 4514-16, Dr. First, API, Tr. 6853, Casey, G. E., Tr. 7905, Janus, Hooker, Tr. 4162).

INORGANIC ARSENIC

The Council on Wage and Price Stability (Ex. 169) and some industry representatives (Ex. 12 for example) suggested a control strategy involving principal reliance on respiratory protection, to reduce the cost of compliance. The Council on Wage and Price Stability commented as follows:

> . . . The council is glad to see that the authors of the IIS considered alternatives to the proposed standard. But while the costs of these alternatives are displayed, the information on benefits is so deficient that it is impossible to make informed choices among them. Furthermore, we note that the authors did not consider the alternative of respirators and reformed work practices instead of engineering controls (where feasible) and that they did not consider applying engineering controls only to new plants and not "retrofitting" old plants. Our overall conclusion is that OSHA should develop better information on benefits before promulgating the instant standard requiring engineering controls. We recognize that OSHA is faced with a double-edged dilemma. If a significant number of lives could be saved by moving to the proposed standard and OSHA does not do so, then these lives will be lost. On the other hand, if moving to the proposed standard has little or no benefits, then promulgating the proposed standard would mean sizeable increases in costs for little benefit. As an interim measure, the Council urges OSHA to consider permitting firms to meet a tighter inorganic arsenic exposure standard by means of personal protective devices and revised work practices rather than through engineering controls. This has the advantage of increasing worker safety (at some obvious disadvantage to the worker) while minimizing the risk of having promulgated a costly standard for little social gain.

James E. Foard, Phelps Dodge Corporation, commented on OSHA's preference for engineering controls as follows [Ex. 12].

> OSHA's expressed preference for engineering controls to reduce workplace levels of exposure, regardless of any balancing of costs and benefits, ought to be carefully reconsidered. Where, as in the case of our smelters, tens of millions of dollars in capital and operating costs might be imposed in efforts to maximize control by this method, even though the likelihood of success is virtually non-existent, such preference can create substantial inequity. Unfortunately, the task of reducing very low level concentrations of arsenic or any other substance--down to nearly background levels is much harder, costly and likely to fail than is the reduction of higher concentrations to more tolerable levels. While we recognize that some of the proposed regulatory language appears to recognize the possibility that engineering

> controls may in some cases not be workable, other language appears not to. In any event, the phrase "greatest extent possible," is so vague as to create constant uncertainty and invite continuing conflict. There are a number of ways in which this situation might be remedied, and we urge that OSHA give them careful consideration. One would be to recognize the increasing difficulty of using engineering controls as concentrations decrease, and set a higher level of concentration -- perhaps in the range of .5 mg./ cu.m -- to which engineering controls would be the sole preferred approach. Another would be to build an express cost-benefit analysis into the concept of engineering feasibility. A third would permit a one-time showing that engineering controls are not practical to terminate efforts to achieve that approach. A fourth would be simply to express no preference as to the method by which worker protection is to be effected. Any of these, singly or in combination, would provide sounder and less troublesome regulation, with no diminution of worker protection.

[Note: Data were not provided by this commenter in support of the assertion that there would be" no diminution of worker protection" if respirators would be used in lieu of engineering controls.]

COTTON DUST

Some participants recommended a control strategy involving principal reliance on respiratory protection, to reduce the cost of compliance. However, based on data in the record, OSHA has determined that respirators have many disadvantages which preclude primary reliance or co-reliance on respiratory protection on an equal basis with engineering and work practice controls. The many difficulties with respiratory protection were enumerated at the hearing by respirator expert Bruce Held (Tr. 483): because of difficulties in face fit, it is difficult to know whether the respirator actually provides adequate protection; respirators, by interfering with vision, hearing, and mobility, can cause safety problems; some employees cannot wear respirators because of breathing difficulties.

Held concluded his testimony by stating:

> I hope that the comments that I have made on some of the details and ramifications of providing an adequate respirator program will discourage anyone from trying to use respiratory protection in place of good engineering controls. Respirators programs, if done properly, to adequately protect workers health are expensive to initiate, expensive to maintain, cost the employer additional money from decreased employee efficiency, prohibit employees who can not wear a respirator for one reason or another from working in jobs where respirators are required, lower employee morale, as who would want to wear a covering over their face for 40 hour a week.

OSHA has concluded from this rulemaking that it is not appropriate to place the burden of compliance principally on the employee, as would be the case if respiratory protection were the principal means of reducing employee exposure. Therefore, OSHA retains in the standard the policy of principal reliance on engineering controls and work practices, except in circumstances where there is no feasible alternative to reliance on respiratory protection.

BENZENE

The benzene standard requires employers to institute engineering and work practice controls to reduce employee exposure to benzene to or below the permissible exposure limits, except to the extent that such controls are not feasible. In reaching the decision to require engineering and work practice controls as the primary methods of reducing benzene exposures, OSHA carefully considered the objections of various participants. While recognizing that in many situations engineering and work practice controls are the preferred methods of reducing exposures to or below the permissible levels, several participants recommended that the hierarchy of control measures be eliminated and employers be allowed the freedom of selecting the control measure to be instituted.

For example, the American Iron and Steel Institute commented:

> The proposed standard improperly elevates engineering and work practice controls to a position of priority as a compliance method, with the use of respiratory protective devices consigned to a position of last resort. By establishing this priority, OSHA has improperly deprived employers of desirable flexibility in determining the most appropriate method of complying with the performance standard. This is not a consideration that can be dismissed lightly.

> For example, because of the nature and age of coke by-products plants there is a serious question as whether through retrofitting it is technologically or economically feasible to comply with an exposure limit of one ppm in such facilities simply by the use of engineering and work practice controls. At the time, respirators could probably provide any protection that is necessary and might well have to be used whether or not specific engineering controls were implemented.
>
> In short, while, engineering and work practice controls may be the most appropriate means to comply with the performance standard in some cases, there will be other situations in which they are clearly not the preferred method of compliance and cannot fairly be said to be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment". Indeed, in many cases, engineering controls would be the most expensive but least efficient method of achieving a reduction in exposure to benzene.
>
> For these reasons, AISI believes that the proposed standard should not establish any priority of compliance methods but rather should allow the employer to develop a compliance program which explains why the particular control method has been chosen.

Industry participants further argued against a system of priorities because of alleged unfeasibility of engineering controls. Most of these participants objections to methods of compliance, however, lie in the area of economic rather than technological feasibility (Com. 49, p. 5; Com. 54, p. 2; Com. 73, p. 3).

In spite of these objections, however, it was pointed out in the benzene rulemaking (Ex. 59) that respirators are the least satisfactory means of control because of difficulties inherent in their design and use. Respirators are capable of providing good protection only if they are properly selected for the types and concentrations of airborne concentrations present, properly fitted and refitted to the employee, worn by the employee, and replaced when they have ceased to provide protection. While it is theoretically possible for all of these conditions to be met, it is more often the case that they are not. Consequently, the protection of employees by respirators is not always effective and is, therefore, permitted only in certain specified circumstances. For example, proper facial fit, individual facial dimensions and the limited range of the facepiece configurations, such fit , individual facial dimensions and the limited range of the facepiece configurations, such fit is difficult to achieve. (Tr. 332-335) Often the work involved is strenuous and the increased breathing resistance of the respirator reduces their acceptability to employees.. Safety problems presented by respirators must also be considered. Respirators limit vision. Speech is also limited. Voice transmission through a respirator can be difficult, annoying and fatiguing. Movement of the jaw in speaking also causes leakage. Communication may make the difference between a safe efficient operation, on the one hand, and confusion and panic, especially in difficult and dangerous jobs, on the other hand. Moreover, skin irritation can result from wearing a respirator in hot, humid conditions and such irritation can use considerable distress and disrupt work schedules. It is clear, therefore, that respirators cannot be considered as the primary means of employee health protection. Nevertheless, respirators do provide some protection and OSHA has concluded that under certain limited circumstances, where no alternatives are available, respirators may be used to reduce employee exposures.

ACRYLONITRILE

Respiratory protection may be used only during the time period necessary to install engineering controls, where engineering controls may be inappropriate, such as during some maintenance operations, or in those cases when both engineering controls and work practices do not succeed in reducing exposures below the permissible exposure limit. Respirators are also to be use in emergencies. This policy is based upon the view that the most effective means of controlling employee exposure is to contain emissions of toxic substances at their source through the use of mechanical means combined with work practices. This is far more effective than reliance on the highly variable human behavior so critical to the successful use of respirators. As discussed in the preamble to this rule, respirators have many disadvantages which preclude primary reliance or co-reliance on respiratory protection on an equal basis with engineering and work practice controls. Furthermore, the burden of reducing employee exposure should more properly rest on the employer in whose establishment toxic substances are released, rather than placing the burden of respirator use on the exposed employee.

During this rulemaking, however, The Council on Wage and Price Stability suggested a control strategy involving principal reliance on respiratory protection to reduce the cost of compliance (Ex. 27).

The Council stated:

> OSHA's current practice is to require installation of engineering controls that reduce exposure to the lowest feasible level. When these controls cannot meet the required levels, OSHA requires firms to develop new technology while temporarily supplementing the controls with respirators. This process might lead to wasteful expenditures and actually add to delay if the new technology makes the old technology obsolete. Furthermore allowing workers to take off their respirators once the permissible level of exposure has been reached can expose workers to additional risk.

However, affected companies themselves acknowledge the difficulties inherent in reliance on respirators protection:

For example, Vistron Chemical (Ex. 92) commented as follows:

> Massive use of certain types of respirators as a means of compliance with the standards is undesirable for numerous reasons. While they provide adequate protection against exposure to potential health hazards associated with acrylonitrile, respirators are physically uncomfortable, particularly during summer months, inhibit employee mobility, constitute a safety hazard by impairing vision, are difficult to utilize where employees require corrective lenses, present labor relations difficulties associated with mandatory use, and are difficult to monitor for continued effectiveness.

Vistron also commented that:

> Vistron estimates that an employee equipped with an airline respirator is only 75 percent efficient. Thus, a manpower increase of approximately 33 percent for that portion of the work force equipped with respirators would be entailed as part of the cost of compliance. Not only does this increase costs, it also increases the number of workers potentially exposed.

Respirator expert Darell Bevis testified during this rulemaking that proper facial fit is essential, but due to variations in individual facial dimensions, as well as facial hair, scars, or growths, it is difficult to maintain. Fatigue and reduced efficiency may occur more rapidly among workers wearing respirators due to increased breathing resistance, heat stress, and reduced vision. Additional problems include the entanglement of hoses of air-supplied respirators, as well as limited mobility resulting from hose length and bulkiness of the apparatus. (Ex.. 19).

LEAD

The final lead standard requires employers to institute engineering controls and work practices, including administrative controls, according to a specific implementation schedule to reduce employee exposure to lead below the PEL. The priority of control methods required by the lead standard, i.e., use of respiratory protection only as a supplement to engineering controls and work practices or as an interim measure while engineering controls and work practices are being implemented, is supported by evidence from the record and is consistent with the policy approach taken in all prior air contaminant standards promulgated by OSHA. Almost all representatives of the lead industries, including LIA and BCI, concurred with this approach provided engineering and work practice controls were feasible. (Ex. 342, p 6; Ex. 355; Ex. 341, p. 12). The rationale behind this approach is based primarily on two principles. One is that protection of the employee is most effectively attained by elimination or minimization of the hazard at its source, which work practice and engineering controls are both designed to do, and the other is that methods which depend upon the vagaries of human behavior are inherently less reliable than well-maintained mechanical methods. The validity of these generalizations has been borne out by agency experience obtained througnout OSHA's existence and has been reiterated by many professional industrial hygienists for the lead record. (Tr. 2068). Engineering control is unquestionably the best method for effective and reliable control of employee exposure to lead. (Tr. 1 366; Ex. 270, p. 20) It acts on the source of the emission and eliminates or reduces employee exposure without reliance on the employee to take self-protective action. This method encompasses product substitution, process product substitution, process or equipment redesign, process or equipment enclosure, exhaust or dilution ventilation, and employee isolation (e.g., a standby pulpit, but not personal protective equipment). Once it is implemented, it protects the employee permanently, subject only, in some cases, to periodic preventive maintenance.

While respirators are the least satisfactory means of exposure control, they are capable of providing protection if properly selected, fitted, maintained, replaced when they cease to provide adequate protection, and worn whey required. While it is theoretically possible for all of these conditions to be met, it is often the case that they are not, and as a consequence, the protection of employees by respiratory function may not be able to wear certain types of respirators, such as those operating in the negative pressure mode. Several witnesses addressed the difficulty in obtaining a proper fit in some employees.

(Ex. 91, Tr. 1240-1; Tr. 6433, Tr. 6476; Ex. 155A). There are more problems associated with respirator use than those of fit. Fatigue and reduced efficiency occur more rapidly among workers wearing respirators due to increased breathing resistance, hearing stress and reduced vision. (Ex. 91); Tr. 6476) Safety problems presented by respirators must be considered. (Ex. 91) Respirators may limit vision, which is a significant factor where numerous physical hazards exist and the employee's ability to see is important. Speech is also limited. (Ex. 91) Voice transmission through a respirator can be difficult, annoying and fatiguing. (Tr. 5871, 6616) Communication may make the difference between a safe, efficient operation and a hazardous jobs. Entanglement of hoses of air respirators as well as limited mobility due to hose lengths, are problems in heavy industrial environments. (Ex. 91, Tr. 4014) Self-contained breathing apparatus have the double problem of restriction of motion and necessity for carrying around heavy weight. (Ex. 91).

Respiratory protection is relegated to the bottom of the compliance priority list because it is an ineffective, unreliable, and unsafe method of reducing employee exposure.

The Council on Wage and Price Stability (Ex. 224) and some industry representatives (Ex. 3(107) suggested a control strategy which would permit employers to place principal reliance on respiratory protection where employers determined that it was a "less costly method of achieving the same level of worker health." (Ex. 224, p. 14).

The Council's assertion was based on the following discussion:

> In order for OSHA adopt alternative action on lead that promises to yield the most benefits for the least cost, OSHA would have to reconsider its insistence on the use of engineering controls. Each firm would then be permitted to use its expertise and experience in deciding upon the best exposure controls for each work area. No doubt employers will opt for engineering controls rather than protective equipment or revised work practices in any area where they are ultimately less costly. However, where there are few workers or when lead exposure is occasional firms may very well choose protective equipment as the less costly method achieving the same level of worker health. A less capital -intensive means of protecting workers (such as personal protective equipment) would not burden the small firm with few employees the way the proposed standard does. Therefore, the anti-competitive effect of OSHA's proposal could be largely avoided.

[Note

OSHA agrees in this addendum that respirators should be permitted if less costly and equally protective. Data were not provided by the Council or other lead rulemaking participants that show, however, that respirators are equally protective as engineering controls.]

Another proponent of respirator use (St. Joe, Ex 3-107) stated:

> St. Joe believes that mandating engineering controls and work practices as compliance mechanisms and allowing respiratory protection to be used only as as last resort is counterproductive and not in accordance with sound industrial hygiene and occupational health practices. Mandating engineering controls even if they will not reduce exposure to below the permissible limit shows total disregard for economic senses. Further mandating work practice controls prior to the use of respiratory protection may inject OSHA into the labor management bargaining field. At the requested public hearings, St. Joe intends to introduce evidence relating to the feasibility and reliability of engineering and work practice controls for achieving compliance with the proposed standard. Such evidence will show the arbitrary nature of the priorities assigned to the compliance mechanisms in the proposed standard believe that reliance upon work practice controls is as an alternative to either engineering controls or personnel protective controls is desirable. An operation, well removed from the main operations area, involving only one or two men, subject to infrequent exposure, St. Joe believes should require respiratory protection rather than engineering control or work practice control. St. Joe will provide data in this respect at the hearing.

[Note: For purposes of this addendum, it should be noted that the data alluded to in support of their argument for greater reliance on respirator use was not submitted by St. Joe as promised.]

ETHYLENE OXIDE

The final ethylene oxide standard requires employees to institute engineering and work practice controls to reduce the exposures of employees to or below the permissible exposure limit, to the extent feasible. If engineering and work practice controls have been implemented but have not been sufficient to reduce exposures to the permissible limit, respirators shall be used to supplement the engineering and work practice controls.

OSHA has identified several ETO operations where engineering controls generally are not feasible in the ETO industry and has listed them as instances where respirators would be acceptable. [OSHA was able to identify those instances due to the receipt of sufficient data demonstrating the infeasibility of engineering controls for these operations in this industry. Data is not available in this record to enable OSHA to apply this determination to other industries.]

Many commenters reported that they preferred to rely on engineering and work practice controls to reduce employee exposure to ETO (Exs. 11-38, 11-40, 11-45, 11-87). For example, Donna Swenson, Central Service Supervisor and Chairman of the ETO Committee of Rockford Memorial Hospital (RMH), stated:

> At RMH we feel that it is possible with the use of appropriate engineering and workplace controls to comply with the proposed standard. Respirators should not be needed except during emergency situations, such as leakage of a tank or canister (Ex. 11-81].

Similarly, Brian J. Kuske, Assistant Administrator of St. Mark's Hospital in Salt Lake City, commented:

> After review of the exposure levels recommended by OSHA (in the proposal), St. Mark's Hospital has concluded that * * * respirators are not essential (to meet the 1 ppm requirement) (Ex. 11-36).

The views of these and other commenters generally provided support for the determination made by OSHA at the time of the proposal that:

> The (control) methods that can be used to reduce employee exposure to ETO are conventional technology such as * * * exhaust ventilation, double mechanical seals leak detection and and use of respiratory protection for intermittent exposures (48 FR 17298).

Evidence submitted at the hearing on ETO and in post-hearing comments identified a number of intermittent exposure situations in ETO-using facilities where respiratory protection may be needed to protect workers from hazardous exposures. For example, in the ETO production sectors, several commenters stated that respirators would be needed for maintenance and repair activities and during the loading/unloading of tank cars (Exs. 11-110, 11-131, 11-133, Tr. 863).

Edward J. Kerfoot, Director, Toxicology and Industrial Hygiene for BASF Wyandotte Corporation, stated that, "Respirators should be allowed in other operations in addition to maintenance and repair. In industry, examples would be bulk loading and unloading operations" (Ex. 11-131). Two ethoxylator firms, Nalco Chemical Company and PPG Industries, Inc., also stated that in loading/unloading operations respirators would be required to achieve compliance with the standard (Exs. 11-69, 11-105).

Another commenter also indicated that the use of respirators would be necessary during maintenance, repair, and tank car loading/unloading activities (Ex. 11-57). In addition, it was suggested that "* * * companies may need to use respirators during start-up and shut-down and during certain laboratory operations" (Ex. 11-57). OSHA also recognized [from data submitted to this docket] that unexpected release of ETO might occur during shut-down and start-up because processes are not operating in steady-state conditions, and the use of respirators may be appropriate in such situations.

[Note: It is pointed in this addendum that although OSHA concluded from the data submitted to this record that some ETO operations do not lend themselves to control through engineering means, this conclusion was based only on data showing the infeasibility of engineering controls, and not on data demonstrating the control equivalency of respirators.]

The **Chairman**. And did they accept that memorandum?

Dr. **Weiner**. Well, we thought they had, because we did not hear anything further from them for several months.

The **Chairman**. And did Mr. Baroody then send a memo to the Department's Assistant Secretary in May 1987 which addressed the methods of compliance policy?

Dr. **Weiner**. I believe that he did.

The **Chairman**. I have a copy of that memo here, and it states, as a result of negotiations with OMB, that "OSHA has agreed to issue an NPRM in September, with a final rule in September of 1988. The NPRM would be cast as a number of possible options, including making no change, and seeking public comment. The NPRM will need to take into account the proposal on respirators, which is scheduled to be published this month."

[The memo referred to above follows:]

U.S. Department of Labor

May 12, 1987

MEMORANDUM FOR ALAN MCMILLAN
SUSAN MEISINGER
JOHN PENDERGRASS
GEORGE SALEM
ROGER SEMERAD
DAVID WALKER

FROM: MICHAEL E. BAROODY

SUBJECT: DOL's Regulatory Program

We have finally reached agreement with OMB on all outstanding issues related to DOL's part of the Administration's regulatory program. This program should be published late this month or early in June. I want to thank each of you and your staffs for the help that you have given us in putting it together.

Of course, the hardest part remains. We must now carry out the program with its many difficult regulatory issues. And, the timing is very tight on many of these items. Some of the dates in the program have been slipped to recognize that the dates initially proposed by you have already been missed. We must strive to meet the dates that have now been agreed to. OMB has a tracking system and it will be periodically asking how we are coming on various regulations. I have asked my staff to do the same thing so that the PRB can know ahead of time of any major problems that are developing.

Attached is a listing of the most important regulatory issues about which OMB raised questions or asked that major changes be made in their presentation.

Attachment

Regulatory Issues

1. 541 (ESA) - DOL has not met the schedules it has agreed to in past years and OMB insisted that we speed up efforts to issue final revisions to these regulations which specify when certain administrative, executive, etc. employees are exempt from the FLSA's minimum wage and overtime provisions. We have agreed to an NPRM in August (which means it must be to the FR by mid-July) and final regulations in December.

   We can expect OMB to push for the NPRM to propose abolishing salary tests entirely. If we do not think that this is appropriate or justified by the ANPR comments, then we will have to build a strong case for our position.

2. Access to Medical Records (OSHA) - The new regulation has been approved by OMB and will be issued in final. However, OSHA will need to form, with other parts of the government concerned with medical records, an interagency committee to determine if ways can be found to reduce the burdens on employers. The recommendations of this committee need to be received by the end of this year.

3. Noise (OSHA) - OSHA has agreed to seek public comment on the possibility of reducing the paperwork burdens resulting from its noise standard. This request for comments is due in July of this year.

4. Methods of Compliance (OSHA) - OSHA has agreed to issue an NPRM in September with a final rule in September of 1988. The NPRM would be cast as a number of possible options (including making no change) and seeking public comment. The NPRM will need to take into account the proposal on respirators which is scheduled to be published this month.

5. Storage and Handling of Toxic Chemicals (OSHA) - OMB has apparently accepted the necessity for this rulemaking and has been informed that OSHA intends to combine it with two other standards for hazardous materials; flammable and combustible liquids and flammable and compressed gases. OSHA will have to develop a combined description for this (an SFA) for submission to OMB.

6. Responses to Petitions (OSHA) - OSHA has received three petitions for health standards (cadmium, bloodborne infectious diseases, and smoking in the workplace). The first two of these are in the program, with no indication of what may happen after OSHA decides how to respond. The third was just received. OSHA will have to prepare a new

SRA for the smoking petition for submission to OMB. OSHA also will need to supply new dates for action beyond the decision stage on the other two, especially cadmium now that OSHA's proposal to move forward with expedited rulemaking has been approved by the FFE...

7. Short-Term Exposure Limits (STEL's) (OSHA) - OSHA agreed to include language in the SRA for ethylene oxide that STEL's normally will only be issued if it can be shown that a given short-term, high exposure can have a different dose response effect than would be expected from the same total dose experienced over a longer time period. However, the problem is exacerbated by the language in the court decision on ethylene oxide and OSHA may have to move on STEL's for other substances (e.g., asbestos and benzene) if a STEL would act to increase protection, but no differential dose-response data exist. (Such data do exist for benzene.)

8. Self-Contained Self-Rescuers (SCSR's) (MSHA) - OMB has agreed to allow MSHA to proceed with an emergency temporary standard for training with SCSR's. While this will not be in the published regulatory program, MSHA will need to develop an SRA for submission to OMB.

9. Diesels in Underground Coal Mines (MSHA) - MSHA's proposal shows an ANPRM being issued at an undedetermined date. OMB knows this is incorrect given the recent promises to Senator Hatch. MSHA must develop a new schedule for OMB which takes into account the Advisory Committee.

10. Respirator Certification (NIOSH) - OMB pushed through an SRA for NIOSH to move quickly on a new regulation for certifying respirators. MSHA and OSHA have agreed to this and it will require MSHA to rescind its current regulations in this area and defer to NIOSH. MSHA and OSHA are sending a joint memo to NIOSH on their technical concerns with NIOSH's proposal.

The CHAIRMAN. So according to the memorandum, Mr. Baroody agreed with OMB that OSHA would publish a proposal even though OSHA had strongly recommended against doing that a few months earlier; is that right?

Dr. WEINER. That seems to be the case, yes.

The CHAIRMAN. So the scientists recommended maintaining the current rules which have a sound scientific basis, and the Policy Review Board and OMB apparently are trying to overrule it.

Mr. Baroody's memo states that OSHA agreed to publish a proposal. Did you, as OSHA's health scientist supervising the project, have knowledge of such an agreement?

Dr. WEINER. No, I did not.

The CHAIRMAN. Mr. Martonik, were you aware of OSHA's agreement?

Mr. MARTONIK. I was not.

The CHAIRMAN. Dr. Weiner, did you then prepare a proposal?

Dr. WEINER. Yes, we did.

The CHAIRMAN. And to what effect was that proposal?

Dr. WEINER. Well, the proposal that we prepared was simply a reaffirmation of our present policy.

The CHAIRMAN. And did the Policy Review Board accept that proposal?

Dr. WEINER. No, they did not.

The CHAIRMAN. They did not?

Dr. WEINER. They did not.

The CHAIRMAN. Was it revised?

Dr. WEINER. Yes, it was.

The CHAIRMAN. And has it been OSHA's compliance policy that there are special circumstances where respirators can be used instead of engineering controls?

Dr. WEINER. Yes.

The CHAIRMAN. And did the new proposal incorporate OSHA's usual policy, which specifies five situations where respirators would be permitted?

Dr. WEINER. Yes, it did.

The CHAIRMAN. So, under pressure, all you were really doing was restating in the proposal what was already in the current policy; is that it?

Dr. WEINER. That is correct.

The CHAIRMAN. And in subsequent weeks, did a special assistant to the Solicitor General write a memorandum requesting that certain elements be added to the proposal?

Dr. WEINER. Yes, he did.

The CHAIRMAN. And what were those elements?

Dr. WEINER. One of them was that he wanted to specify situations in which short-term exposures would enable one to use respirators rather than engineering controls. And the second was he wanted to consider cost factors with respect to the selection of engineering controls vis-a-vis respirators.

The CHAIRMAN. Well, I have the memorandum here. It is from the Office of the Solicitor. Subject: OSHA's Proposed Methods of Compliance Revision.

"I would like to raise for purposes of discussion two possible additions to these provisions, as follows." Then it says, at the top of page 2, "work situations in which the hazardous exposure is one of a very brief duration, but in no event longer than"—it leaves that blank. "Individual instances of use of respiratory protection under this provision shall not exceed"—and that is blank—"times in any one work shift and shall be separated by periods of at least"—blank—"minutes."

Then it continues: "Operations in which the estimated cost of compliance through utilization of administrative or engineering controls exceeds by a factor of"—blank—"times that of compliance through respiratory protection. An employer utilizing this provision shall notify OSHA thereof and permit upon request OSHA to review its compliance with all relevant respiratory protection requirements."

[The memo referred to follows:]

Rec'd
1-12-88

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

JAN 12 1988

MEMORANDUM FOR FRANK A. WHITE
Deputy Assistant Secretary for Occupational Safety and Health Administration

ROLAND DROITSCH
Deputy Assistant Secretary for Policy

FROM: RANDEL K. JOHNSON
Special Assistant to the Solicitor

SUBJECT: OSHA's Proposed Methods of Compliance Revisions; Suggested Modifications

According to the most recent draft of the above referenced regulatory initiative in my possession (dated 11/13/87), OSHA proposes to amend its current "methods of compliance" policy with regard to air contaminants, 29 CFR 1910.1000(e), by adding the following paragraph:

> Respiratory protection may be used in lieu of administrative or engineering controls to achieve compliance with paragraph (a) through (d) of this section under the following circumstances:
>
> 1. During the time necessary to install feasible engineering controls;
> 2. Where feasible engineering controls cannot reduce exposure to acceptable levels. These would include: field situations where there is a lack of utilities for implementing engineering controls;
> 3. During emergencies, including life saving, recovery operations, repair, and shutdowns;
> 4. Operations requiring an added degree of protection or where there is the possibility of failure of normal controls; and
> 5. Entries into unknown atmospheres.

I would like to raise, for the purpose of discussion, two possible additions 1/ to these provisions as follows:

1/ I am, frankly, unclear as to what p[illegible]vision #4 means but do not intend to address that problem here.

6. Work situations in which the hazardous exposure is one of very brief duration, but in no event longer than _____ (30?) 2/ minutes at any one time. Individual instances of use of respiratory protection under this provision shall not exceed _____ (4?) times in any one work shift and shall be separated by periods of at least ___ (30?) minutes.

7. Operations in which the estimated cost of compliance through utilization of administrative or engineering controls exceeds by a factor of _____ (3?) times that of compliance through respiratory protection. An employer utilizing this provision shall notify OSHA thereof and permit, upon request, OSHA to review its compliance with all relevant respiratory protection requirements.

DISCUSSION

The purpose of addition #6 is to simply allow for use of respirators in very short-term exposure situations, even where those exposures may be a regular part of the job, on the rationale that it makes little sense to require the installation of expensive, permanent engineering controls in these kinds of very temporary exposure situations. A worker entering a gaseous room to perform a brief task would be an example. Requiring evacuation of the entire room through engineering controls in this situation would seem to be inappropriate, assuming a respirator will provide adequate protection. 3/

Express time limitations have been built in to preclude abuse of this provision, that is, to prevent an employer from exploiting the provision in those situations where, in reality, the employee is actually engaged in work requiring long-term exposure. The

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2/ The numbers in () are only intended as illustrations. Only OSHA, obviously, has the expertise to credibly fill in the blanks for the purposes of an NPRM.

3/ OSHA's allowance for use of respirators in the various circumstances discussed in the preamble indicate that respirators do, indeed, provide adequate protection in many situations. I do not see any inherent peculiarity about the short-term exposure/work situation covered by the proposed language which would render respirators incapable of providing protection. Further, OSHA's proposed, improved respirator standard, once finalized, coupled with the express requirement in 1910.1000(e) that any personal protection requrement be approved "for each particular use by a competent industrial hygienist or other technically qualified person" should help ensure that only effective, properly operating respirators will be used.

time limitations also resolve one of the primary criticisms of respiratory protection programs: that respirators are inherently so uncomfortable to use that employees will move them around on their face (creating leakage) or take them off entirely. While this criticism is very valid with regard to long term respiratory use, the short term time limitations built into this provision should significantly reduce or eliminate employee discomfort and the resultant danger of employee misuse.

Addition #7, the considerably more controversial, is intended (admittedly inartfully, yet directly) to address the type of situation best exemplified by OSHA's early enforcement of the traditional methods of compliance hierarchy in the hearing conservation standard context in which the costs of engineering controls wildly exceeded those of the relevant personal protective devices. 4/ Of course, if respiratory usage does not adequately protect the employee in a given work situation, additional costs for feasible engineering controls, whatever they may be, must be incurred. Further, it is a given that, while respirators may provide "adequate" protection in many situations, engineering controls, for many reasons, are the preferred method of control. Nevertheless, in situations involving greatly increased costs, this "preference" may not be justifiable, so long as respiratory protection is adequate, particularly if the additional incremental protection afforded by engineering controls is, in fact, relatively slight. I have attempted to incorporate these concepts into rough proposed regulatory language, making clear that the provision could only be utilized (thus retaining the "preference") when the costs of engineering

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4/ See, e.g., Donovan v. Castle and Cooke Foods, 692 F.2d 641 (9th Cir. 1982) in which development and installation of proposed engineering controls would cost approximately $700,000, and that the loss of production due to the controls would cost an additional estimated $250,000 annually, while personnel protective devices would cost approximately $1,000.

It appears the subject methods of compliance proposed changes only apply to air contaminants, and, thus, I reference the hearing conservation enforcement situation only for example. Is my understanding as to the limited nature of this proposal correct? If so, should areas other than air contaminants where issues concerning trade-offs between engineering controls and personal protective devices arise also be included? What other such areas exist?

controls exceed the costs of respiratory protection by a certain multiple. 5/ The multiple I have suggested, 3X, has been arbitrarily selected for the purpose of initiating discussion;

5/ I recognize that interested parties could argue (without a great deal of imagination) that this provision is incorporating cost/benefit considerations into OSHA's judgment as to what types of control are appropriate in what kinds of situations. Some difficult policy and legal issues are thereby raised which need to be discussed. The primary legal question is, of course, to what degree, if at all, does the Supreme Court's decision in Cotton Dust limit OSHA's discretion in adopting cost/benefit analysis into this proposal.

OMB will likely attempt to avoid the cost/benefit debate entirely by contending that engineering controls should not be accorded a preference over respiratory protection because both are equally effective; that is, engineering controls are not, contrary to OSHA's position, inherently better than respirators. The debate thus becomes couched in terms of cost effectiveness, clearly not precluded by Cotton Dust, allowing employers simply to choose the least expensive form of compliance. Of course, if OSHA could argue that respirator use in combination with the proposed "notification" requirement provided protection equal, or virtually equal, to that provided by engineering controls, it also could couch the debate in terms of cost effectiveness.

OSHA, could, perhaps, avoid the Cotton Dust quandary by defining through compliance directives the term "feasible" as used in the air contaminants method of control hierarchy with cost/benefit concepts. In Castle and Cooke Foods, supra, the court upheld OSHRC's cost/benefit definition of feasibility in the hearing conservation context, rejecting the Secretary's argument that Cotton Dust precluded this approach, on the basis that Cotton Dust only addressed standards issued under sec. 6(b)(5) of the Act. As the hearing conservation standard was issued under sec. 6(a), Cotton Dust was not controlling. Presumably, this rationale could be extended to other standards issued under 6(a) such as the subject air contaminant standard. Of course, there may be very good policy reasons (such as differences between the hearing conservation/hearing protectors situation and that of the air contaminant/repirators situation) which would mitigate against this approach. Indeed, as the agency's current practice is one of long standing, some reasonable justification for change would be needed.

perhaps a more general test such as "extreme disproportionate cost" would be more appropriate. A bright line rule, however, has its obvious advantages. Required notification of OSHA of use of this provision would allow the agency, presumably, to frequently review the state of respiratory protection afforded employees to ensure they are, in fact, being adequately protected. Notification would also deter cavalier reliance on this provision.

In closing, I would like to emphasize that I offer these suggestions for the purpose of discussion only and am not wed to the textual language proposed or, even, convinced of the merits of my suggestions, particularly #7. However, I do believe they deserve consideration, if for no other reason than that OMB will be sure to raise similar issues upon submittal under E.O. 12291. I also believe that we should include all reasonable approaches in the NPRM regulatory text itself (as versus simply posing ANPRM type questions in the preamble) in order to generate as many comments as possible. We can always cut back in final rulemaking should the record support it. 6/ Further, actual proposed regulatory language is necessary at this juncture to limit APA "notice" problems later.

6/ This is consistent with OSHA's traditional approach to coverage questions (e.g., lockout/tagout) in which OSHA has argued that an NPRM with broad industry coverage is the best way to obtain comment from all interested parties, rather than simply proposing a narrow scope with a preamble question indicating that broad coverage is a possibility.

cc: George Salem
Cindy Attwood

The CHAIRMAN. In your opinion, would those additional elements result in a major change in OSHA's review of engineering control versus respirators?

Dr. WEINER. Yes. They would completely change the thrust of our compliance activities.

The CHAIRMAN. So if adopted, would the suggested changes severely weaken OSHA's ability to enforce engineering control requirements?

Dr. WEINER. Yes, I think it would make it very difficult if not, in many cases, impossible.

The CHAIRMAN. Mr. Martonik, is that a crucial requirement for protecting the health of workers?

Mr. MARTONIK. Yes, it is, without a doubt.

The CHAIRMAN. And Mr. Martonik, do you agree with Dr. Weiner's testimony up to this point?

Mr. MARTONIK. I do.

The CHAIRMAN. Dr. Weiner, are you aware that as a result of the subsequent meeting of the Policy Review Board on January 21, 1988, that Mr. Baroody's staff pressured OSHA to ask in the proposal whether to adopt the two new exemptions proposed by the Solicitor General?

Dr. WEINER. I have no first-hand knowledge of what happened in that meeting.

The CHAIRMAN. Well, I will include the minutes of that meeting in the record.

[The minutes referred to follows:]

MINUTES

POLICY REVIEW BOARD

January 21, 1988

ATTENDEES: Messrs. Baroody, Maroni, Pendergrass, Salem,
Adkins, Ms. Attwood, Clair, Copeland, Droitsch,
Ms. Eckhart, Goodwin, Jacoby, R. Johnson, MacLaury,
Ms. Morris, Riley, Ms. Silvey, Thorn, F. White, Witt

Mr. Baroody opened the meeting at 10:05 a.m. and noted that there are two items on the PRB "fast track": a final ESA rule on labor standards under the National Foundation on the Arts and Humanities Act, and an OSHA options memorandum on maritime gear certification. Regarding the latter, he suggested possibility of removing the item from the Regulatory Program since no regulatory action is planned until 1990. OSHA agreed with him.

Methods of Compliance - OSHA

Mr. Pendergrass discussed OSHA's options memorandum outlining five general conditions under which reliance on respirators rather than engineering controls would be acceptable. These included: 1) while installing engineering controls; 2) where engineering controls alone cannot achieve acceptable exposure levels; 3) during emergencies, repairs and shutdowns; 4) for operations requiring added protection or where there is the possibility of failure of normal controls; and, 5) for entries into unknown atmospheres.

In addition, Mr. Pendergrass noted that the Solicitor's Office has raised for discussion two additional conditions where respirators would be allowed: 6) for specified short-term exposures (STEs); and, 7) when the cost of engineering controls is determined to be excessive relative to that of respirators, in situations where respirators provide adequate protection.

Regarding 6) above, Mr. Pendergrass felt that this was already covered in the 5-point proposal. Mr. Baroody suggested that the STE issue be raised explicitly in either the preamble or the body of OSHA's proposal so that there could be public comment on it. MSHA staff discussed experience they have had in dealing with similar issues in their regulations.

After extended discussion, OSHA agreed to the Board's recommendation that there be included in the preamble a full discussion of the STE issue and a call for comment thereon.

There followed discussion of cost effectiveness issues mentioned in provision 7) above. The Board recommended that OSHA raise these issues in the proposal. Mr. White noted that inclusion of this provision would place OSHA in a difficult position. He pointed out that under existing court decisions, the costs of available methods of compliance can be considered only when they provide equal degrees of protection. However, OSHA's policy has traditionally been that engineering controls by definition provide better protection. Mr. Baroody suggested that the above two points are consistent with Administration policies.

The Board recommended that a special committee be set up to draft language acceptable to all parties that would incorporate the issues raised in 6) and 7) above. This committee, consisting of staff from OSHA, MSHA, SOL and ASP, is to complete work by 2/1. The proposal will then be fast-tracked for clearance before submission to OMB by mid-February.

All parties agreed to this arrangement and Mr. Baroody adjourned the meeting at 11:13 a.m.

The **Chairman**. Did you in fact change the preamble again to open the door to the two considerations raised in the memo?

Dr. **Weiner**. We modified the preamble so that the basic elements of these two considerations could be considered, yes.

The **Chairman**. Mr. Martonik, are you aware that on March 26th of this year, Vice President Bush met with members of the President's Task Force on Regulatory Relief to discuss the progress that had been made in carrying out the initiatives of the Task Force?

Mr. **Martonik**. I am aware that there is a memo reporting such a meeting.

The **Chairman**. And is that the same task force that directed OSHA to revise the methods of compliance policy in 1981?

Mr. **Martonik**. Yes, it is.

The **Chairman**. So, revising the policy is still one of the priorities of the Task Force; is that correct?

Mr. **Martonik**. That is correct.

The **Chairman**. I have a memo here from Michael Baroody to Assistant Secretary John Pendergrass regarding the meeting with the Vice President, and it says, "On Tuesday, the Vice President met with the members of the Task Force on Regulatory Relief to discuss the progress on priority regulations and legislation. In its status report on regulations, OMB was critical of the Department of Labor for failing to meet its commitments and deadlines. The Vice President affirmed this and expressed his personal interest and concern in completing the regulatory agenda established by the Task Force. He directed each of us to cooperate fully with OMB in completing the Task Force Initiative."

"OSHA was singled out by OMB for strong criticism for its failure to act expeditiously on methods of compliance."

The memo also indicates that OSHA was singled out at the meeting for its specific failure to act on the methods of compliance standards.

[The memo referred to follows:]

U.S. Department of Labor

Assistant Secretary for Policy
Washington, D.C. 20210

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MEMORANDUM FOR: JOHN PENDERGRASS

FROM: MICHAEL E. BAROODY MEB

SUBJECT: Vice President's Task Force On Regulatory Relief

On Tuesday, the Vice President met with the members of the Task Force On Regulatory Relief to discuss the progress on priority regulations and legislation.

In its status report on regulations, OMB was critical of the Department of Labor for failing to meet its commitments and deadlines (Attachment 1). The Vice President affirmed this and expressed his personal interest and concern in completing the regulatory agenda established by the task force. He directed each of us to cooperate fully with OMB in completing the task force's initiatives.

The deadlines published in the annual Regulatory Program are our commitment to carrying out the actions and schedules approved by the President. While OMB's clearances clearly contribute to some delays and while I have criticized their presentation of our performance, the fact remains we have not done as well as we can and should and we will have to do better.

In reviewing the performance of agencies within the Department, OSHA has been consistently late in meeting deadlines, both in its submissions to the PRB and its subsequent dealings with OMB. Moreover, OSHA was singled out by OMB for strong criticism for its failure to act expeditiously on methods of compliance, the carcinogen policy, excavations, and face, head, eye and foot protection regulations (Attachment 2). While other regulations were not mentioned by name, OSHA, because it has far the greatest number of regulations to deal with, is inevitably a major part of the slippage problem shown in OMB's charts.

As a result, I would like you to review the status of all your regulations and let me know immediately about any potential delays in meeting your commitments for the rest of the year, particularly with regard to these four regulations.

Attachments

ATTACHMENT I

UNFINISHED BUSINESS IN THE 1988 REGULATORY PROGRAM

Purpose

This year, President Reagan will be issuing the fourth annual Regulatory Program of the United States Government. Prior to adoption of Executive Order No. 12498 in 1985, there had been no process comparable to the fiscal budget to set priorities for developing and imposing Federal regulations. Instead, individual actions were initiated, developed, and pursued by the rulemaking agencies, and only then reviewed in the Executive Office.

Under E.O. 12498, we now publish a comprehensive document presenting to the American public and Congress the basic regulatory program for the Executive branch. The Regulatory Program, however, is not merely descriptive. It is managerial--top Administration officials are to develop systematically and personally the Administration's regulatory goals and priorities. As President Reagan wrote on January 4, 1985, in explaining Executive Order 12498:

> Each agency head will thus be accountable for the management of the regulatory process, to ensure that policy options are not narrowed prematurely and that each significant regulatory proposal will be considered in relation to others.

The Regulatory Program constitutes a managerial commitment--the President's commitment to the American people, and by the same token, the commitment of the agency heads to the President--to undertake particular regulatory actions in accordance with the published strategy and schedule. Over the past three years, we have addressed and tracked in the Regulatory Program major initiatives such as emissions trading, airport slot marketing, and biotechnology.

The Regulatory Program has now become an important management tool by which the Adminstration can set forth its regulatory program, and provide this information to the public early in the regulatory process. With this procedure, the President and his appointees can review major regulatory activities for the coming year, establish regulatory priorities, and coordinate with each other.

Agency Adherence to Published Deadlines

The deadlines published in the Regulatory Program constitute an agency's managerial commitment to its portion of the President's regulatory program. Thus, one aspect of the Regulatory Program that provides a straightforward measure of internal agency efforts to manage regulatory development is how well agencies meet the deadlines announced in the Regulatory Program.

One pattern that has emerged is a slippage in schedules for the development of all rules, and particularly for degregulatory rules. In the attached graph, we show the overall track record for agency performance based on the 1987 Regulatory Program.

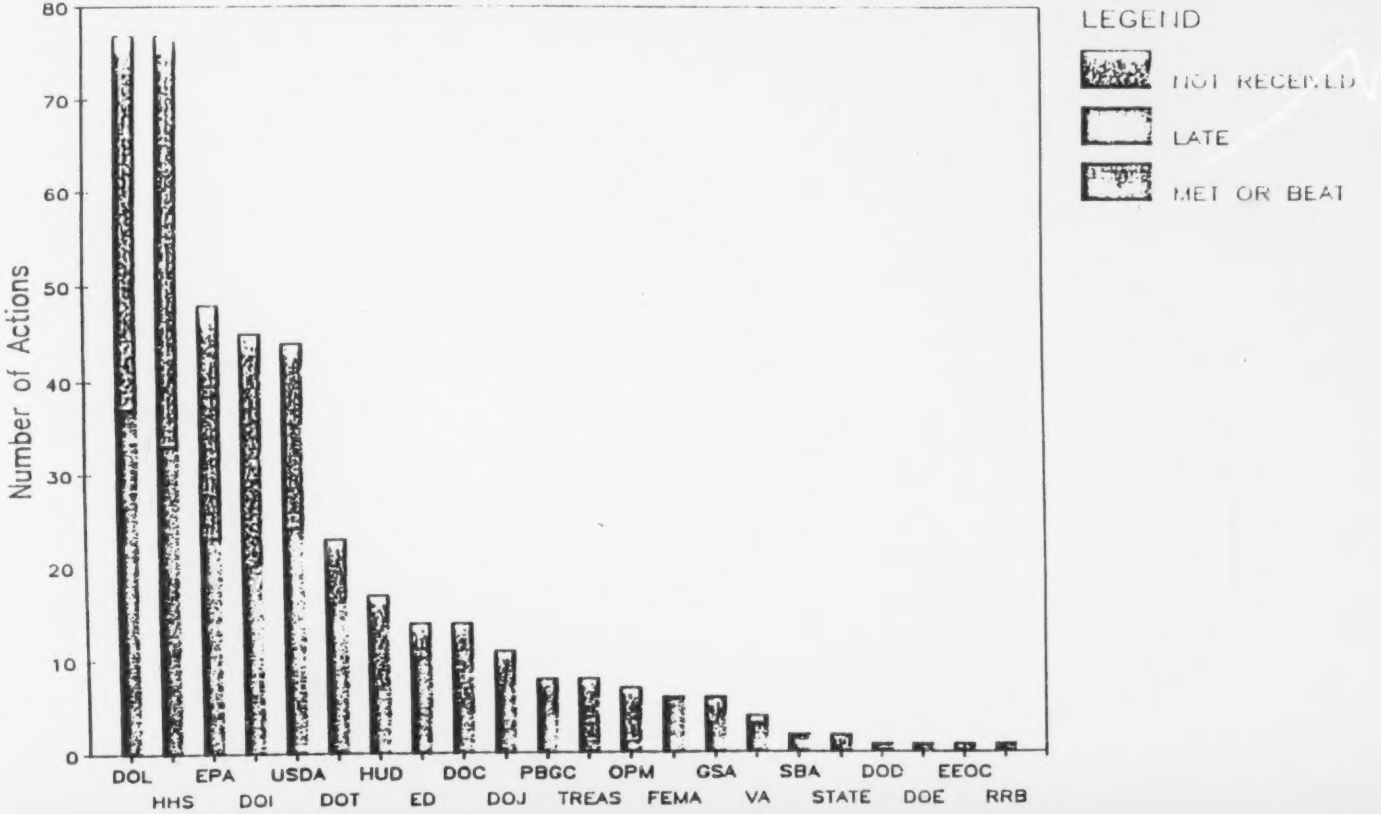
Experience has shown that the deadlines set in one Regulatory Program have slipped in the next Regulatory Program--and often slipped again. We realize that development of a regulation can take many unpredictable turns along the way; deadlines will slip and regulatory priorities may shift as the year progresses.

In too many cases, however, the Executive Office has urged an agency to speed up a deregulatory action--to publish an NPRM or final rule sooner than reluctant program staff may want--as part of the review process. Moreover, in too many cases, agency agreements to revise dates have led only to further revisions in schedules rather than rulemaking development. And President Reagan did state, in issuing the 1985 Regulatory Program, "[t]he next step is for each agency to implement its part of the ... Program, as planned and on schedule."

In the tables and summary descriptions that follow, we list agency commitments to complete specific actions by the end of this Administration. While these are only a selection of the most important commitments that have slipped, there is only so much time left--we believe these are priority items that should be vigorously pursued this year.

Most are deregulatory in nature. Many of these deregulatory actions involve proposals that, even if not concluded during the remaining months of this Administration, can help to set the regulatory agenda for the next administration. Others are cost-effective regulatory actions, while still others would finally terminate rulemakings that have dragged on for years. Although it is only a partial listing, these commitments comprise important elements in the legacy this Administration wishes to leave for its successor.

1987 REGULATORY PROGRAM
AGENCY PERFORMANCE IN MEETING SCHEDULES
APRIL 1, 1987 TO FEBRUARY 18, 1988



Issue	1987 Regulatory Program	1988 Draft Regulatory Program	Slippage from Original Commitment (in months)
Labor (Tab E)			
Occupational Safety and Health Administration			
- Methods of Compliance, NPRM (DA)	August 1987	April 1988	48
- Carcinogen Policy, NPRM (DA)	October 1987	June 1988	66
- Face, Head, Eye and Foot Protective Equipment, NPRM (DA)	October 1987	December 1988	34
- Excavations, Final (CE)	May 1988	December 1988	16
Employment Standards Administration			
- Davis-Bacon Helpers, Final (DA)	January 1988	Uncertain	Over 4
- White Collar FLSA Exemptions, NPRM (DA)	August 1987	April 1988	73

KEY:

(DA) = Deregulatory Action (CE) = Cost-effective Action (T) = Termination

* -- Assumes no action in 1988 Regulatory Program Year.

The CHAIRMAN. So effectively, the Vice President was directing the Department of Labor to cooperate fully with OMB in completing the weakening of the methods of compliance policy; is that correct?

Mr. MARTONIK. That's correct.

The CHAIRMAN. I also have a copy of a summary prepared by OMB for the meeting, dealing directly with the methods of compliance standard. It indicates OMB's plans for the standard which the Vice President directed OSHA to cooperate fully with. And it says here: "Although we are too late to finish the rulemaking in the next year, publication of the NPRM will open the rulemaking process and raise for public comment many of the issues which should have been considered in the original policy."

[The summary referred to follows:]

ATTACHMENT I

Summary of Delayed Department of Labor Actions

OSHA Methods of Compliance

OSHA's methods of compliance rule, adopted in 1971, requires employers to comply with OSHA regulations limiting exposures to hazardous substances or conditions by using engineering controls (ventilation, enclosed processes) and work practices whenever they are technologically and economically feasible. Other methods of protecting workers, such as respirators, gloves, and hearing protectors, are not permitted as a method of compliance unless engineering controls and work practices are infeasible. OSHA did not apply any cost-effectiveness analysis in establishing this hierarchy of controls, and this policy has resulted in hundreds of millions of dollars in additional costs that may not have increased worker protection.

This policy was targeted for revision by the President's Task Force in 1981 and has been listed in the Regulatory Program since 1985. OSHA has repeatedly scheduled revisions over the years, but has missed all of its schedules. A draft rule has circulated within the Department, but was not sent to OMB. Although we are too late to finish the rulemaking in the next year, publication of an NPRM will open the rulemaking process, and raise for public comment many of the issues which should have been considered in the original policy.

Slippage in Regulatory Program Dates

Action	1985 Regulatory Program	1986 Regulatory Program	1987 Regulatory Program	Draft 1988 Regulatory Program	Slippage from Original Commitment (months)
NPRM	December 1985	December 1986	August 1987	April 1988	48

The CHAIRMAN. Is an NPRM the same as a proposal?

Mr. MARTONIK. Yes. An NPRM is a Notice of Proposed Rulemaking.

The CHAIRMAN. So OMB wants OSHA to raise all the issues in the proposal necessary for weakening the standard; is that right?

Mr. MARTONIK. That's correct.

The CHAIRMAN. Mr. Martonik, is OSHA now redrafting the methods of compliance proposal again, following the order given by the Vice President?

Mr. MARTONIK. We have finished redrafting it, and we have sent it to the Office of Management and Budget for their review.

The CHAIRMAN. Dr. Weiner, does the proposal now include language asking whether employers should have the discretion to decide for themselves whether to use the engineering controls or respirators?

Dr. WEINER. Yes, it does.

The CHAIRMAN. In your opinion, based on the scientific and technical information at your disposal, are respirators provably effective enough to justify this latitude?

Dr. WEINER. According to all the data we have, respirators are not only not as effective, but there is no successful measurement technique which can actually predict exactly what they are doing in the workplace.

The CHAIRMAN. In your opinion, would such a change establish a policy which would be substantially less protection to the health of workers?

Dr. WEINER. I believe that it would.

The CHAIRMAN. Mr. Martonik, do you agree?

Mr. MARTONIK. I agree with that.

The CHAIRMAN. What is the status of the proposal now?

Mr. MARTONIK. The proposal has been sent to the Office of Management and Budget, with the changes you just described.

The CHAIRMAN. Let me just summarize for a moment what we have gone over. In 1981, the President's Task Force on Regulatory Relief recommended revising the methods of compliance policy. In 1983, at the urging of OMB, OSHA published an Advance Notice of Proposed Rulemaking on the methods of compliance policy. OSHA then strongly recommended that the agency should not proceed any further by publishing a proposal on methods of compliance. The Policy Review Board did not accept OSHA's strong recommendations against publishing a proposal and agreed with OMB that OSHA would publish a proposal.

Then OSHA proposed to keep the existing policy on methods of compliance. The Policy Review Board did not accept that proposal, so OSHA instead proposed to clarify the circumstances where respirators can be used. Then the PRB directed OSHA to ask for comments in the proposal on two broad exemptions which, if adopted, would severely weaken the policy.

Now, under pressure from the Vice President, OSHA has changed the proposal again to raise more issues for comment which, if adopted, would significantly weaken OSHA's ability to enforce engineering control requirements.

Dr. Weiner, Mr. Martonik, is that a fair and accurate summary?

Dr. WEINER. Yes, I believe it is.

Mr. **Martonik**. Yes, it is.

The **Chairman**. And is it not true, Dr. Weiner and Mr. Martonik, that engineering controls are accepted by the industrial hygiene community to be the principal safeguard for health workers?

Dr. **Weiner**. Yes.

Mr. **Martonik**. Yes.

The **Chairman**. Mr. Martonik, in your opinion, should the staff have been spending any of its time on a standard which, according to OTA and the premier experts in the field, is fundamentally sound and provides the most protection to workers?

Mr. **Martonik**. I felt it was a waste of our time reviewing this issue.

The **Chairman**. Dr. Weiner.

Dr. **Weiner**. Yes, I agree.

The **Chairman**. Mr. Martonik, in spite of this, you have to tie up five years of staff time working on weakening the methods of compliance standard.

Mr. **Martonik**. That's correct. The answer is yes—we have spent five needless years working on this project.

The **Chairman**. Thank you very much.

We now go to questions of bloodborne diseases. Dr. Harwood, what is your position at OSHA?

Dr. **Harwood**. I am a health scientist in the Directorate of Health Standards Programs.

The **Chairman**. And how long have you been working on health standards?

Dr. **Harwood**. Approximately nine years.

The **Chairman**. And you are the health standards staff person in charge of the bloodborne disease standard; is that right?

Dr. **Harwood**. Yes, I am. I am the project officer.

The **Chairman**. And was the agency petitioned by the Service Employees International Union and the American Federation of State, County and Municipal Employees in September 1986 for an emergency temporary standard to protect workers from the hepatitis B virus and the AIDS virus?

Dr. **Harwood**. Yes, we were.

The **Chairman**. And did the petition state that 5.5 million health care workers are at risk of becoming infected with bloodborne diseases?

Dr. **Harwood**. Yes.

The **Chairman**. And did AFSCME's petition state that despite the seriousness of the AIDS epidemic and the frequency with which health care workers are exposed to infectious materials that health care workers have no legal remedy to require employers to comply with infectious control guidelines?

Dr. **Harwood**. Yes, they did.

The **Chairman**. Do you think it is a legitimate concern of health care workers to want appropriate infection control against the AIDS virus?

Dr. **Harwood**. Yes, I certainly do.

The **Chairman**. And did the SEIU petition state that 250 health care workers die each year from the hepatitis B virus alone?

Dr. **Harwood**. Yes, they did.

The **Chairman**. Do you agree with that estimate?

Dr. HARWOOD. Yes, I do, and experts have confirmed that number.

The CHAIRMAN. And shortly after the petition was received, did you meet with representatives of the Centers for Disease Control and NIOSH to gather data?

Dr. HARWOOD. Yes, we met with them, and I spent a week in Atlanta, gathering data and talking to the experts at the CDC.

The CHAIRMAN. And did you prepare an options memorandum for the Assistant Secretary in March of 1987, based on your analysis of the data and your professional opinion?

Dr. HARWOOD. Yes, we did.

The CHAIRMAN. And what did you recommend?

Dr. HARWOOD. I recommended that the agency publish a proposed standard. The memo was signed by Charles Adkins, director of Health Standards

The CHAIRMAN. And did the Assistant Secretary change your recommendation for a proposed standard before it was sent to the Policy Review Board and recommend instead publishing an Advance Notice of Proposed Rulemaking?

Dr. HARWOOD. Yes, he did.

The CHAIRMAN. What is the effect of the Assistant Secretary's change?

Dr. HARWOOD. The effect is that a year has gone by, and we are no closer to a standard than we were a year ago.

The CHAIRMAN. So the real effect is delay.

Dr. HARWOOD. Delay, yes.

The CHAIRMAN. Did nothing further happen until OSHA was subsequently asked to appear before Congressman Lantos' subcommittee in July 1987 to explain why the agency had not yet responded to the September 1986 emergency petition?

Dr. HARWOOD. Yes, that's correct.

The CHAIRMAN. And did the Assistant Secretary commit to Congressman Lantos at the hearing that OSHA was going to publish a permanent standard for bloodborne infectious diseases?

Dr. HARWOOD. I was not at the hearing, but I read the transcript, and no, he did not.

The CHAIRMAN. What commitment did he make?

Dr. HARWOOD. As far as rulemaking goes, he said the agency would publish an Advance Notice of Proposed Rulemaking.

The CHAIRMAN. And did the Assistant Secretary also commit to enforcing protective guidelines developed by the Centers for Disease Control in the interim?

Dr. HARWOOD. Yes, he did, under the General Duty Clause of the Act.

The CHAIRMAN. So the Assistant Secretary changed your recommendation to publish a proposal a few months earlier in a way that would delay publication of a standard and now would only commit to publishing an Advance Notice of Proposed Rulemaking; is that right?

Dr. HARWOOD. That's correct.

The CHAIRMAN. Were there meetings on October 14th and 15th, 1987 to receive comments on OSHA's plan to enforce the CDC guidelines which you attended?

Dr. **Harwood**. Yes—well, actually, the meeting was for comments on the joint advisory notice; yes, I was there at that meeting.

The **Chairman**. And are these the notes which you took at the meeting?

Dr. **Harwood**. Yes, they are. That is a copy of my notes, yes.

The **Chairman**. The Assistant Secretary said—these are the notes—"Rulemaking is complicated and time-consuming. We will consider a permanent rule, but first we need information. We will always be reasonable . . . contemplating a rule down the road a ways."

[Memo and notes supplied follows:]

FEBRUARY 1~~5~~6, 1988

MEMORANDUM FOR: CHARLES E. ADKINS

FROM: SUSAN HARWOOD SH

SUBJECT: ADDITIONAL DOCUMENTS FOR SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

On January 15, 1988, I was interviewed by Walter Sheridan and Eric Lieberman from the Senate Committee on Labor and Human Resources. During the interview, they asked for a number of documents which I gave to you as an enclosure to a memo written on January 19, 1988. They also asked for my notes from the October 14 - 15, 1987 meeting with outside participants to discuss the Joint Advisory Notice. I apologize for the delay, but the handwritten notes were difficult to read and had to be typed. I have enclosed a typed copy of the notes and a xerox copy of the notes.

Donna [Richardson of ANA] - citations (?) What is OSHA
looking for?

Agency nurses & respiratory therapists
temporaries

Targeted enforcement
train COSHOS
# of facilities (?)

Want hospitals to implement CDC guidelines

AHA will also mail to
members

1PM 10/14 AIDS meeting

Opening Remarks Pendergrass

"Rulemaking is complicated and time
consuming" - Hint

"We will 'consider' a permanent rule"
but first we need information

epidemic speech
Questions -
(1) How will the COSHOs be trained?
VA hospitals

(2) "All body fluids" tears, saliva
urine

Cannot eliminate other fluids
because the virus is present

All body fluids are not equal
Some are more equal than others

(3) How does this fit w/JCAH?
Should they enforce it?
Can't pass responsibility on to others They should augment

(4) Low risk groups (blood donors)
same requirements for HCW
blood donor groups

(5) Prophylaxis - hepatitis B0
(a) vaccine for everyone
(b) survey the groups (screen)

(6) Risk - blood bank people

(7) Handwashing availability

(8) CPR

(9) Enforce the CDC guidelines
-J Pendergrass

(10) Who makes the determinations?
J.P. People ask for
Performance Oriented
Standards - then
people ask how to
do it --

OSHA is trying to get away from
Specification standards

(11) CPR
mouth to mouth - [is this] the proper modality?
will OSHA
cite for not having proper
equipment [for] CPR

"We will always be reasonable."

---

(10) Airline Crews

(11) They [a conference participant] want saliva, urine, etc.
out
social problems

(12) Gloves - Does anyone use other
than "surgical" gloves

disadv. vinyl gloves

JAN doesn't require surgical gloves

Later this month a meeting with the National
Governors Association

Waste Carriers $10,000,000

10/15 Meeting #5

Joint Committee on Accreditation of Health Care Organizations

"contemplating a rule down the
road aways" F. White

"interim measures"

(1) Guidance for wearing gloves
casual -vs- blood contact

(2) Vortex in a splash box
Centrifuge should not be in a hood

(3) Sample or guideline for SOP

What standard Operating Procedures
are available for various tasks

50¢/lb for infectious wastes
2¢/lb noninfectious wastes

Numerous citations (?) What ~~areas~~ is OSHA looking for?

Agency nurses & Respiratory therapists
temporaries

Targeted enforcement
train CSHOs
# of facilities (?)

Want hospitals to use CDC guidelines

AHA will also mail to members

1pm 10/14 AIDS meeting

Opening Remarks Pendergrass

"Rulemaking is complicated and time consuming" - First

"We will "consider" a permanent rule" but first we need information

epidemic speech

Questions -
① How will the COSHOs be trained?
VA hospitals

② "All body fluids" tears, saliva
urine

⑩ Who makes the determination?
People Ask for
JP. Performance Oriented
Std - then
People ask how to
do it -

OSHA trying to get away from
Specification Stds

⑪ CPR
mouth to mouth - proper modality?
Will OSHA
Cite for not having proper
equip (CPR)

"We will always be reasonable!"

⑩ Airline Crews

⑪ They want saliva, urine, etc
out
Social problems

⑫ Gloves - Does anyone use other
than "surgical" gloves

disadv. vinyl gloves

JAN doesn't req surgical gloves

Later this month a meeting w/National Governors Assn

Waste Carriers #10

10/15 Meeting #5

Jt Com on Acc of H-C ~~Institutions~~ Organizations

"contemplating" a rule down the road a ways" F. White

"interim measures"

① Guidance for wearing gloves/ casual -vs- blood contact

② Vortex in a splash box

Centrifuge should not be in a hood

③ Sample or Guideline for SOP

~~[illegible]~~

What Standard Operating Procedures are available for various tasks

50¢/lb inf waste
2¢/lb noninf waste

10

The **Chairman**. What is your impression from what they said in the meeting—that they were in favor or not in favor of issuing a standard?

Dr. **Harwood**. Well, they certainly didn't make any commitment to issue a standard or a proposal.

The **Chairman**. So the Assistant Secretary was again refusing to state that OSHA would be setting a permanent standard?

Dr. **Harwood**. That's correct.

The **Chairman**. You certainly did not get the impression from that meeting that—there is nothing in your notes—that they were going to move ahead in setting a standard.

Dr. **Harwood**. No, there was nothing there that I heard.

The **Chairman**. That you could detect from it.

So do you think the agency sees the voluntary guidelines as a way out of regulating?

Dr. **Harwood**. Well, that is a very difficult and sensitive question, but a year after our options memorandum, we haven't started working on a proposed standard, so I guess you could draw that conclusion.

The **Chairman**. So, despite hedging at the meeting, did the Assistant Secretary finally respond to the Unions' petition in October 1987?

Dr. **Harwood**. Yes, he did.

The **Chairman**. And over a year after it was filed, he indicated in his response that OSHA would be setting a permanent health standard for hepatitis B and AIDS?

Dr. **Harwood**. Yes, that's what the letter says.

The **Chairman**. Did you prepare an Advance Notice of Proposed Rulemaking?

Dr. **Harwood**. Yes, we did.

The **Chairman**. And did OMB economists insert an additional question for public comment into the Notice?

Dr. **Harwood**. Yes, they did.

The **Chairman**. I will make this part of the record.

"Effectiveness of alternative approaches. How can OSHA best accomplish its goal of ensuring that workers at significant risk are protected from occupational exposure to HIV and HPV? What additional protection would be afforded by a permanent standard in light of the immediate ongoing activities of DOL and HHS and existing regulations?"

[Memo supplied follows:]

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

B

EXCERPT FROM

November 18, 1987

MEMORANDUM FOR: CHARLES E. ADKINS

THROUGH: PETER F. INFANTE
ACTING DIRECTOR
OFFICE OF RISK ASSESSMENT

FROM: SUSAN HARWOOD
PROJECT OFFICER

SUBJECT: Comments on the hepatitis B/AIDS ANPR from OMB, the Solicitor's Office and the office of the Assistant Secretary for Policy

SOL

(12) Advances in hazard control: How could OSHA structure a standard [illegible] bloodborne diseases so that the standard would reflect, on a continuing basis, technological advances and other improvements in methods of controlling hazards creating by such diseases which were developed after promulgation of the standard. Similarly, is there any way OSHA could use a source outside the agency, such as guidelines published by the Centers for Disease Control, which are updated frequently, as indicative of what regulatory protections employers must provide for their employees?

OMB

(13) Effectiveness of Alternative Approaches: How can OSHA best accomplish its goal of ensuring that workers at significant risk are protected from occupational exposure to HIV and HBV? What additional protection would be afforded by a permanent standard, in light of the immediate on-going activities of DOL and HHS and existing regulations?

(14) Environmental Effects: The National Environmental Policy Act (NEPA) of 1969 (42 USC 4321, et seq.) the Council of Environmental Quality (CEQ) regulations (40 CFR Part 1500; 43 FR 55978, November 29, 1978), and the Department of Labor (DOL) NEPA Compliance Regulations (29 CFR Part 11; 45 FR 51187 et seq., August 1, 1980) require that Federal Agencies give appropriate

The **Chairman**. Now, does that insert by OMB's economists change the thrust of the Notice from how OSHA should do a standard to whether OSHA should do a standard?

Dr. **Harwood**. Yes, it does.

The **Chairman**. And by including that, isn't OMB inviting commentators to question the need for a standard?

Dr. **Harwood**. Yes, they clearly are.

The **Chairman**. Is OMB's change consistent with the agency's earlier commitment in their denial letter to the Unions' petition which indicated that OSHA would be developing a standard?

Dr. **Harwood**. I don't believe that it is—no, it is not.

The **Chairman**. So it is not consistent?

Dr. **Harwood**. No, it is not consistent.

The **Chairman**. Did you as a health professional agree with the change?

Dr. **Harwood**. No, I did not.

The **Chairman**. So it took the agency more than a year after the petition was filed to publish an Advance Notice of Proposed Rulemaking, which does not guarantee further rulemaking and which ended up questioning the need for a standard because OMB inserted language to that effect; is that correct?

Dr. **Harwood**. That is correct.

The Chairman. During all this time, you believe that the agency had enough information to publish a proposal for a bloodborne disease standard back in March of 1987 when you made your initial recommendation to the Assistant Secretary; is that correct?

Dr. **Harwood**. That is correct.

The Chairman. Would we be closer to having a permanent standard today if the agency had followed your recommendation?

Dr. **Harwood**. Yes, we would.

The **Chairman**. Mr. Martonik, I understand that shortly after the Notice was published, the agency submitted its annual plan for upcoming regulatory actions to OMB for approval.

Mr. **Martonik**. Yes, we did.

The **Chairman**. I have a memo here, documenting OMB's response to OSHA's proposal. It states: "OMB has disallowed the following prospective agency information collections listed in the ICB." And number (b) is "bloodborne infectious disease survey and NPRM".

[The memo referred to follows:]

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

DEC 15 1987

MEMORANDUM FOR FRANK CHALMERS
FRANK FRODYMA
HUGH CONWAY
DEL FLOWERS

FROM: MAUREEN KELLEHER-EDICK
AGENCY REPORTS MANAGEMENT OFFICER

Maureen Kelleher-Edick

SUBJECT: OMB FY 88 PASSBACK -- PRELIMINARY RESULTS

According to Paul Larson of DIRM/OASAM, the Department has been advised by OMB today of its decisions on the FY 88 ICB. The following actions affect the OSHA paperwork budget submission:

1. ACTION: OMB has reduced the Department's overall burden hour budget for FY 88 by eight (8) million hours. It is intended that the following actions affecting OSHA information collections will assist in meeting this overall reduction.

2. ACTION: Six million hours of the total Hazcom burden hour estimate (as shown in the ICB) disallowed.

BASIS: OMB maintains that during recent meetings with OSHA tech staff, agreement was reached to create a generic cooperative assistance program in connection with the expanded version of Hazcom. OMB assumes that this action will result in an overall reduction of six million burden hours (This agreement needs to be confirmed).

DESIRED AGENCY ACTION: OMB directs OSHA to develop a work schedule for development of a generic cooperative assistance program for HazCom and provide it to OMB. They have given the agency a target completion date of April, 1988 to accomplish this task.

3. ACTION: OMB has disallowed the following prospective agency information collections listed in the ICB:

a. Hazardous Waste Site surveys
b. Bloodborne Infectious Disease Survey and NPRM
c. Anesthetic Waste Gasses Survey

BASIS: None given.

4. ACTION: OMB advises the agency to reestimate and reduce burden hour estimates for Formaldahyde and MDA information collections proposed in ICB.

OMB Passback - Recap of Burden Hours

Information Collections Disallowed

		Requested fy 88	Disallowed	Adj: Total
1.	Haz. Com. Revision	34,780,000	6,000,000	28,780,
2.	Hazardous Waste Site Survey	2,000	2,000	-0-
3.	Infection Disease Survey	100	100	-0-
4.	Anesthetic Waste Gases Survey	160	160	-0-
5.	Bloodborne Infection Disease NPRM	?	?	

Proposed for Burden Hr. Reduction

			Proposed Yr. 1	Proposed Annual Ongoing
1.	Formaldehyde (final)	(Actual)	955,043	799,521
		(ICB)	1,000,000	
2.	MDA		-500,000	—

BASIS: OMB stated that both estimates appeared too high and should be considered for reduction in connection with the overall departmental 8 million burden hour reduction Details of potential areas for reduction in these collections were said to have been discussed at the September ICB hearing and were referred to today as suggested targets for reduction. Other than that, no further details were given.

APPEAL RIGHTS: The Agency has until Friday, December 18, COB to appeal any or all of the above actions. NOTE: Larson's notes from the meeting were a bit sketchy and therefore possibly incomplete. Further details will be available in the morning when T. O'Malley returns and will be passed along.

cc: Chuck Adkins
    Barry White

The CHAIRMAN. So according to the memo, OMB is now forbidding the agency from proceeding to gather information on bloodborne infectious diseases and from publishing a proposed standard?

Mr. MARTONIK. Yes. That is what this memorandum says. OMB does not give the results of their budget determination or paperwork in writing. Instead they give a verbal transmission of their response. And this memo is a documentation of a meeting that was conducted on the issue.

The CHAIRMAN. Dr. Harwood, did you also prepare an entry for the President's regulatory agenda on the bloodborne infectious disease standard?

Dr. HARWOOD. Yes, we prepared it in our office, yes.

The CHAIRMAN. And as part of the record, it says, "Notice of Proposed Rulemaking, NPRM." This is under the regulation entitled, "Bloodborne Infectious Disease."

"October 1988." So that is when you were intending to have the proposal?

Dr. HARWOOD. Yes, it is.

[Information supplied follows:]

USDOL/OSHA RIN: 1218-AB15

REGULATION TITLE: Bloodborne Infectious Diseses

Milestones

Action	Date
Advance Notice of Proposed Rulemaking published	November 27, 1987
~~Response to Petitioners~~	~~June~~, 1987
ANPR Comments Due	January 26, 1988
Notice of Proposed Rulemaking (NPRM)	October 1988

Agency Contact

Charles E. Adkins, Director
Health Standards Programs
Occupational Safety and Health Administration
Department of Labor
200 Constitution Avenue, NW
Room N3718, FP Building
Washington, DC 20210
(202) 523-7075

The **Chairman**. All right. So in the timetable section, you project having the proposal published in October 1988; is that correct?

Dr. **Harwood**. Yes.

The **Chairman**. Mr. Martonik, did you submit the entry for review by the Assistant Secretary's office?

Mr. **Martonik**. Yes, I did.

The **Chairman**. And is this the document which came back?

Mr. **Martonik**. The document that reads, "Next action undetermined"?

The **Chairman**. Yes.

Mr. **Martonik**. Yes, that is the one that came back.

[Information supplied follows:]

USDOL/OSHA RIN: 1218-AB15

REGULATION TITLE: Bloodborne Infectious Diseses

Next Steps

Legal Deadlines: None.

Milestones

Action	Date
ANPRM	November 27, 1987
Next Action Undetermined	

Agency Contact

Charles E. Adkins, Director
Health Standards Programs
Occupational Safety and Health Administration
Department of Labor
200 Constitution Avenue, NW
Room N3718, FP Building
Washington, DC 20210
(202) 523-7075

The CHAIRMAN. So the document that came back has "ANPRM, Next action undetermined", where Dr. Harwood had written tha OSHA would have a proposal out by October 1988. Did you make that change?

Mr. MARTONIK. No, I did not. I submitted Dr. Harwood's statement that we would have a proposal completed by October.

The CHAIRMAN. And Dr. Harwood, did you make the change?

Dr. HARWOOD. No, I did not.

The CHAIRMAN. Well, who did? Do you know?

Mr. MARTONIK. I don't know.

Dr. HARWOOD. No.

The CHAIRMAN. Dr. Harwood, what is the effect of that change?

Dr. HARWOOD. Well, it further delays rulemaking, or it doesn't show a commitment to making a rule.

The CHAIRMAN. So all that is in effect to protect workers from AIDS and hepatitis B is the CDC guidelines; is that right, as of now?

Dr. HARWOOD. As we can enforce them under the General Duty Clause, that's correct.

The CHAIRMAN. And are these difficult to enforce?

Dr. HARWOOD. The General Duty Clause is always much more difficult to enforce than a permanent standard.

The CHAIRMAN. And are you aware that hospitals are complaining to OSHA because they do not know what is required of them under the guidelines?

Dr. HARWOOD. Yes, I am very much aware of that.

The CHAIRMAN. Could a permanent standard lay out explicitly what is required to protect health care workers?

Dr. HARWOOD. Yes, it would.

The CHAIRMAN. And can OSHA require employers to provide the newly-developed hepatitis B vaccine free-of-charge to health care workers under the guidelines?

Dr. HARWOOD. I don't think they can. I think it would be quite difficult under General Duty to provide that.

The CHAIRMAN. Well, do you think OSHA should require the vaccine?

Dr. HARWOOD. Clearly, I think we should require the vaccine. We talked earlier about the 250 health care workers who died. If those people had been vaccinated, 95 percent of them wouldn't have become infected, and they wouldn't have died. So it is clearly an important thing.

The CHAIRMAN. And there is no permanent standard to protect workers from the AIDS virus; is that correct?

Dr. HARWOOD. No, there is not.

The CHAIRMAN. Is OSHA avoiding setting a permanent standard to protect the Nation's health care workers from the threat of AIDS and hepatitis B?

Dr. HARWOOD. Well, I have observed Department of Labor policymakers for a long time, and I see how they behave when they want to stall and when they want to go forward, and based on that and based on the things I have testified to today, I would say they are delaying.

The CHAIRMAN. Do you have any doubt that health care workers need a permanent standard?

Dr. HARWOOD. I feel that the hospital and the laboratory are workplaces in the same sense that the steel mill and the factory are workplaces; and I think these viruses are occupational hazards in the same sense that asbestos and benzene are occupational hazards. People get infected at work, people get sick, and people die. And I think the only way they can be protected is if OSHA issues a permanent standard.

The CHAIRMAN. Senator Metzenbaum is here. He has been enormously supportive of OSHA and would like to make a brief comment, and those comments will appear at a different place in the record. And then he will be in and out, as will other Senators, during the course of the hearing this morning.

I recognize the Senator from Ohio.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Thank you, Senator Kennedy. I have just come in from out of the City, but I am particularly interested and concerned about these hearings. I want to commend you for holding them.

It was nearly 20 years ago that Congress created the Occupational Safety and Health Administration, and at that time, directed the agency to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."

In my opinion, there is no more important responsibility in our Government. But the evidence seems to indicate that there are dedicated people prepared to enforce the law, but who have been frustrated, in part by the OMB.

I must say to you publicly that every day, I become more and more convinced that the OMB is a detriment to Government operating efficiently and effectively rather than an aid to it. I think many of us thought originally that OMB would have more to do with budgetary considerations; we now find that it is a super power that negates the willingness of dedicated public officials to do their jobs and achieve their objectives. And there is probably no better evidence of that than these hearings being conducted here this morning.

So I very much commend you for moving forward with these hearings, and I will have more to add at a later point in the hearing.

The CHAIRMAN. Thank you, Senator Metzenbaum.

We will go now to the Hazard Communication Standard, and I will address my first questions to Ms. Silk, if I could.

Ms. Silk, what is your position at OSHA?

Ms. SILK. I am a health scientist in Health Standards Programs.

The CHAIRMAN. And how long have you been working on health standards?

Ms. SILK. Almost 14 years.

The CHAIRMAN. And are you the health standards person in charge of the Hazard Communication Standard?

Ms. SILK. Yes. I have been working on it full-time for almost seven years now.

The CHAIRMAN. And did Congress direct the Secretary of Labor in 1970 in the Occupational Safety and Health Act to prescribe the use of labels or other forms of warnings to make sure that employees knew the hazards they were exposed to?

Ms. SILK. Yes. There is a statutory mandate for providing information to workers.

The CHAIRMAN. In 1983, 13 years later, did OSHA publish a final Hazard Communication Standard?

Ms. SILK. Yes, we did.

The CHAIRMAN. And did the final standard only cover the manufacturing sector?

Ms. SILK. Yes, it did.

The CHAIRMAN. And was OSHA sued by the unions because the standard failed to cover the non-manufacturing sector?

Ms. SILK. Yes. We were sued by both the United Steelworkers and Public Citizen on that issue as well as several others.

The CHAIRMAN. In 1985, did the court say that OSHA should expand the standard to cover non-manufacturing, based on the existing record?

Ms. SILK. The court did direct OSHA to reconsider the issue and to extend it if it was feasible to do so.

The CHAIRMAN. And two years after the 1985 court decision, did the court again have to intervene and order OSHA to publish a final standard for non-manufacturing workers because OSHA had delayed the expansion of the standard for so long?

Ms. SILK. Well, we were working on the expansion of the standard, but we were attempting to go through our normal rulemaking process, and the court did issue a second order telling us not to do that and go directly to a final standard.

The CHAIRMAN. In the effort to meet the 1987 court deadline, did you forward drafts of the standard to OMB for their review?

Ms. SILK. Yes, we did.

The CHAIRMAN. And did OMB try to change the standard?

Ms. SILK. Yes, they did make suggestions for changing the standard.

The CHAIRMAN. Are these typewritten suggestions for changes—I have here—it is difficult to see, but I think you know what we are driving at—we have the draft proposal, and then you have OMB'S suggested revisions. And on page after page, as you look to the right, you will see page after page of suggested revisions. You are familiar with that, are you not?

Ms. SILK. Yes, I am.

The CHAIRMAN. A good part of yours are crossed out, and paragraph after paragraph of suggested inserts.

[Information supplied follows:]

DRAFT PROPOSED OSHA STANDARD
(CACOSH VERSION)

7. It is proposed to amend Parts 1910, 1915, 1917, 1918, and 1926 by revising section 1910.1200 as set forth below, and by adding sections 1915.99, 1917.28 and 1918.90, and revising 1926.22 to contain the identical text of the proposed revised 1910.1200, including Appendices A, B, C, and D of 1910.1200:

§________ Hazard communication.

(a) Purpose. (1) The purpose of this section is to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training. The required information is to be provided to employees without cost to them.

(2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject. Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not

SUGGESTED REVISIONS TO OSHA DRAFT (OMB)
(7/24/87)

limited to, provisions for: developing and maintaining a written hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals in the workplace, as well as of containers of chemicals being shipped to other workplaces; preparation and distribution of material safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.

(b) Scope and application. (1) This section requires chemical manufacturers or importers to assess the hazards of chemicals which they produce or import, and all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training. In addition, this section requires distributors to transmit the required information to employers.

(2) This section applies to any chemical which is known to be present in the workplace in such a manner that employees may

1/0 –

Unbelievable!

Add "This section applies to employers with ten or fewer employees who are not in SIC codes 20 through 39 only as follows: employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced. This section does not apply to the construction industry."

This language would tailor the standard to minimize the impact on small businesses who are not in the manufacturing sector (small businesses in the manufacturing sector should not be exempted because they are already complying and because they generate the MSDS for downstream users). Small businesses would only have to ensure that warning labels remained on the products. The construction industry would be exempted entirely on the basis of infeasibility. OSHA has not satisfactorily addressed the problems of multi-employer worksites and transient workforces in this standard. OSHA could announce that a vertical standard would be proposed for construction.

be exposed under normal conditions of use or in a foreseeable emergency.

(3) This section applies to laboratories only as follows:

(i) Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced.

(ii) Employers shall maintain any material safety data sheets that are received with incoming shipments of hazardous chemicals, and ensure that they are readily accessible to laboratory employees; and.

(iii) Employers shall ensure that laboratory employees are apprised of the hazards of the chemicals in their workplaces in accordance with paragraph (h) of this section.

(4) In work operations where employees only handle chemicals in sealed containers which are not opened under normal conditions of use (such as are found in marine cargo handling, warehousing, or retail sales), this section applies to these operations only as follows:

(i) Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;

~~(ii) Employers shall maintain copies of any material safety data sheets that are received with incoming shipments of the sealed containers of hazardous chemicals, shall obtain a material safety data sheet for sealed containers of hazardous chemicals received without a material safety data sheet if an~~

[illegible] problem.

We could work on something to address this

(ii) Employers shall ensure that copies of any material safety data sheets that are received with incoming shipments of the sealed containers of hazardous materials remain with the shipment and are accessible to employees upon request.

Suggested language will ensure that hazard information travels with the shipment and that employees have access to information as needed, without burdensome retention requirements of uncertain utility.

employee requests the material safety data sheet, and shall ensure that the material safety data sheets are readily accessible during each work shift to employees when they are in their work area(s); and,

(iii) Employers shall ensure that employees are ~~provided~~ trained in ~~with information and training in accordance with paragraph (h) of this section, except for the location and availability of the written hazard communication program under paragraph (h)(1)(iii). The~~ be ~~training shall particularly emphasize the~~ proper, protectived ~~procedures to follow~~ in the event of a spill or leak of a hazardous chemical from a sealed container.

(5) This section does not require labeling of the following chemicals:

(i) Any pesticide as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.), when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Environmental Protection Agency;

(ii) Any food, food additive, color additive, drug, cosmetic, or medical or veterinary device, including materials intended for use as ingredients in such products (e.g. flavors and fragrances), as such terms are defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) and regulations

This could be accommodated

Employees who deal only with sealed containers do not need the full training program designed for employees who work with and are regularly exposed to hazardous chemicals. It would appear to be sufficient to keep warning labels intact, give employees hazard information if they request it, and train them in what to do if a labeled, sealed container leaks.

issued under that Act, when they are subject to the labeling requirements under that Act by the Food and Drug Administration; within the United States.

(iii) Any distilled spirits (beverage alcohols), wine, or malt beverage intended for nonindustrial use, as such terms are defined in the Federal Alcohol Administration Act (27 U.S.C. §201 et seq.) and regulations issued under that Act, when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Bureau of Alcohol Tobacco, and Firearms; and,

(iv) Any consumer product or hazardous substance as these terms are defined in the Consumer Product Safety Act (15 U.S.C. §§2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. §§1261 et seq.) respectively, when subject to a consumer product safety standard or labeling requirement of these Acts, or regulations issued under these Acts by the Consumer Product Safety Commission.

(6) This section does not apply to:

(i) Any hazardous waste as such term is defined by the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. §§ 6901 et seq.), when subject to regulations issued under that Act by the Environmental Protection Agency;

(ii) Tobacco or tobacco products;

This is overkill

Put w/ solid metal in labeling

(vi) wood or wood products for which the only hazard posed to downstream employees is wood dust.

This exemption would not exempt manufacturers or downstream employers from the MSDS or training requirements if employees would be exposed to wood dust (a suspected nasal carcinogen). Exempting wood from labels makes sense because wood is not packaged or transferred in "containers" which travel from the manufacturer to the end-user. It would be difficult to keep labels intact as the wood was cut or shaped, and would be onerous to relabel as the wood was resold in varying quantities. Without this exemption, loggers would label tree trunks; saw mills, every bundle of boards; and lumber yards, individual planks purchased by construction contractors (boards purchased by consumers would not have to be labelled).

(iii) Wood or wood products for which there is evidence that the only hazard they pose to employees is the potential for flammability or combustibility;

(iv) Articles, as defined in paragraph (c) of this section, which, under normal conditions of use, do not release or otherwise result in ~~[illegible]~~ exposure to a chemical determined ND to be hazardous under paragraph (d) of this section. Hazard determinations in accordance with paragraph (d) of this section shall be done on the chemicals released, and not on the chemicals still bound in the manufactured item. If a release occurs, the hazard communication requirements of this section shall only apply to the released hazardous chemical(s);

(v) Foods, drugs, or cosmetics intended for personal consumption by employees while in the workplace;

~~(vi) Any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) respectively, where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers;~~

(vii) Nuisance particulates for which, when evaluated in accordance with the provisions of paragraph (d) of this section.

IV preamble

added to container

Could still in handling [illegible] when processed

Unless processed or handled by methods which may release hazardous fumes or dusts, metallic scrap which would have classified as an article before being collected or processed as scrap is classified as an article.

preamble

This revision is intended to remedy the situation in which scrap metal is now considered a "hazardous chemical" simply because it has re-entered the processing stream, even though it would have qualified as an "article" were it not scrap. An example brought out in OMB's public meeting on HC paperwork is a stainless steel spoon, which is considered hazardous as scrap.

We should discuss this

"(vi) Products, including foods, drugs, consumer products, or other substances, packaged or otherwise prepared for retail sale as a consumer product."

This addition will exempt the retail sector, such as grocery stores, drug stores, liquor stores, and hardware stores, from maintaining MSDSs and training their employees about the hazards of the various ingredients in the thousands of packaged products on their shelves. Without this exemption, retail establishments would be inundated with hundreds of thousands of MSDS and would be required to train employees about the hazards of each ingredient of each product. The flood of MSDSs would not enable managers to distinguish the real hazards which pose real risks to employees, and would be of doubtful utility for employers and employees completely untrained in interpreting and using them. Minor escapes of products, such as leaking boxes of laundry soap, would be treated as "emergency spills" of a hazardous substance, and employees would have to be specially trained in how to respond to the leak.

no evidence is found to indicate that they pose any covered physical or health hazard; and.

(viii) Any drug, as that term is defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), when it is in solid, final form for direct administration to the patient (i.e. tablets or pills).

(c) Definitions.

"Article" means a manufactured item, other than a fluid or particle: (i) which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result in exposure to, a hazardous chemical, as determined under paragraph (d) of this section, under normal conditions of use.

"Assistant Secretary" means the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or designee.

"Chemical" means any element, chemical compound or mixture of elements and/or compounds.

"Chemical manufacturer" ~~means an employer with a workplace where chemical(s) are produced for use or distribution.~~

"Chemical name" means the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of

could discuss

"more ~~than~~ de minimis"

unacceptable definition

"An amount shall be considered de minimis if (a) the amount of the hazardous chemical in the article is less than 1 percent by weight or 0.1 percent if the chemical is a carcinogen; or (b) the manufacturer has reason to believe that release of the chemical from the article under expected conditions of use will not exceed an established OSHA PEL."

This addition is necessary to recognize that many articles emit tiny traces of chemicals, but not in sufficient amounts to result in significant exposures. Formaldehyde in a permanent press shirt is an example. Toner on a Xeroxed sheet of paper is another. Traces of naturally-occurring asbestos in a load of gravel may be another.

means an employer in SIC Codes 20 through 39 with a workplace where chemicals are produced for use or distribution.

This definition should not change from the existing regulation, in order to clarify that only these SIC codes are responsible for generating MSDSs. Other SICs should not be required to conduct independent hazard evaluations or develop MSDS. They should be responsible only for disseminating hazard information received from the manufacturing sector. This is consistent with the court order and the purpose of revising the standard: to ensure that existing hazard information, already required by regulation, is communicated to downstream employees.

nomenclature, or a name which will clearly identify the chemical for the purpose of conducting a hazard evaluation.

"Combustible liquid" means any liquid having a flashpoint at or above 100°F (37.8°C), but below 200° F (93.3° C), except any mixture having components with flashpoints of 200°F (93.3°C), or higher, the total volume of which make up 99 percent or more of the total volume of the mixture.

"Common name" means any designation or identification such as code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.

"Compressed gas" means:

(i) A gas or mixture of gases having, in a container, an absolute pressure exceeding 40 psi at 70°F (21.1°C); or

(ii) A gas or mixture of gases having, in a container, an absolute pressure exceeding 104 psi at 130°F (54.4°C) regardless of the pressure at 70°F (21.1°C); or

(iii) A liquid having a vapor pressure exceeding 40 psi at 100°F (37.8°C) as determined by ASTM D-323-72.

"Container" means any bag, barrel, bottle, box, can, cylinder, drum, reaction vessel, storage tank, or the like that contains a hazardous chemical. For purposes of this section, pipes or piping systems are not considered to be containers.

"Designated representative" means any individual or organization to whom an employee gives written authorization to exercise such employee's rights under this section. A recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

"Director" means the Director, National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designee.

"Distributor" means a business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to employers.

"Employee" means a worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies.

"Employer" means a person engaged in a business where chemicals are either used, distributed, or are produced for use or distribution.

"Explosive" means a chemical that causes a sudden, almost instantaneous release of pressure, gas, and heat when subjected to sudden shock, pressure, or high temperature.

~~"Exposure" or "exposed" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry (inhalation, ingestion, skin contact or~~

No!

be expected to be routinely

Language needed to restrict hazard communication programs to employees who work with hazardous chemicals and who could be expected to be at risk from exposures. Employees exposed intermittently would continue to be protected by labels and would not benefit from training in work practices, personal protective equipment, or emergency procedures. Employees exposed in emergencies would continue to be covered.

No!

"Exposure" or "exposed" means that an employee may be expected to be routinely, or in a foreseeable emergency, subjected to a hazardous chemical in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.)

Change is needed to limit the exposure situations covered by the standard to only those in which employees are routinely exposed and those in which foreseeable emergencies (definition as revised) could occur. Eliminates broad, fuzzy concept of "potential" exposure, which could be extended to cover every employee in the country, regardless of actual risk.

absorption, etc.), and includes potential (e.g. accidental or possible) exposure.

"Flammable" means a chemical that falls into one of the following categories:

(i) "Aerosol, flammable" means an aerosol that, when tested by the method described in 16 CFR 1500.45, yields a flame projection exceeding 18 inches at full valve opening, or a flashback (a flame extending back to the valve) at any degree of valve opening;

(ii) "Gas, flammable" means:

(A) A gas that, at ambient temperature and pressure, forms a flammable mixture with air at a concentration of thirteen (13) percent by volume or less; or

(B) A gas that, at ambient temperature and pressure, forms a range of flammable mixtures with air wider than twelve (12) percent by volume, regardless of the lower limit;

(iii) "Liquid, flammable" means any liquid having a flashpoint below 100°F (37.8°C), except any mixture having components with flashpoints of 100°F (37.8°C) or higher, the total of which make up 99 percent or more of the total volume of the mixture.

(iv) "Solid, flammable" means a solid, other than a blasting agent or explosive as defined in §1910.109(a), that is liable to cause fire through friction, absorption of moisture, spontaneous chemical change, or retained heat from manufacturing or processing, or which can be ignited readily and when ignited burns so vigorously and persistently as to create a serious hazard. A chemical shall be considered to be a flammable solid if, when tested by the method described in 16 CFR 1500.44, it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.

"Flashpoint" means the minimum temperature at which a liquid gives off a vapor in sufficient concentration to ignite when tested as follows:

(i) Tagliabue Closed Tester (See American National Standard Method of Test for Flash Point by Tag Closed Tester, Z11.24-1979 (ASTM D 56-79))-for liquids with a viscosity of less than 45 Saybolt Universal Seconds (SUS) at 100°F (37.8°C), that do not contain suspended solids and do not have a tendency to form a surface film under test; or

(ii) Pensky-Martens Closed Tester (see American National Standard Method of Test for Flash Point by Pensky-Martens Closed Tester, Z11.7-1979 (ASTM D 93-79))-for liquids with a viscosity equal to or greater than 45 SUS at 100°F (37.8°C), or that contain suspended solids, or that have a tendency to form a surface film under test; or

(iii) Setaflash Closed Tester (see American National Standard Method of Test for Flash Point by Setaflash Closed Tester (ASTM D 3278-78)).

Organic peroxides, which undergo autoaccelerating thermal decomposition, are excluded from any of the flashpoint determination methods specified above.

"Foreseeable emergency" means any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace.

in amounts sufficient to result in employee exposures which (1) exceed an established OSHA PEL; (2) exceed an ACGIH TLV, or (3) may, on the basis of the information in the MSDS, result in injury or illness to exposed employees.

This language is needed to ensure that the emergency procedures in the training program are aimed at genuinely hazardous "uncontrolled releases," rather than at every spill.

preamble — Quote to preamble?
ers would normally
plan for as a
presumed potential
occurrence
: determined by
the nature
& the
operating
i.e. employer
Agency
[illegible]
5333 [illegible]

Could discuss
some qualifier: this
is a good

"Hazardous chemical" means any chemical which is a physical hazard or a health hazard.

"Hazard warning" means any words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the physical and health hazard(s) of the chemical(s) in the container(s). (See the definitions for "physical hazard" and "health hazard" to determine the hazards which must be conveyed.)

"Health hazard" means a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes. Appendix A provides further definitions and explanations of the scope of health hazards covered by this section, and Appendix B describes the criteria to be used to determine whether or not a chemical is to be considered hazardous for purposes of this standard.

"Identity" means any chemical or common name which is indicated on the material safety data sheet (MSDS) for the chemical. The identity used shall permit cross-references to be made among the required list of hazardous chemicals, the label and the MSDS.

"Immediate use" means that the hazardous chemical will be under the control of and used only by the person who transfers it from a labeled container and only within the work shift in which it is transferred.

"Importer" means the first business with employees within the Customs Territory of the United States which receives hazardous chemicals produced in other countries for the purpose of supplying them to distributors or employers within the United States.

"Label" means any written, printed, or graphic material displayed on or affixed to containers of hazardous chemicals.

"Material safety data sheet (MSDS)" means written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section.

"Mixture" means any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction.

"Organic peroxide" means an organic compound that contains the bivalent -O-O-structure and which may be considered to be a structural derivative of hydrogen peroxide where one or both of the hydrogen atoms has been replaced by an organic radical.

"Oxidizer" means a chemical other than a blasting agent or explosive as defined in §1910.109(a), that initiates or promotes combustion in other materials, thereby causing fire either of itself or through the release of oxygen or other gases.

"Physical hazard" means a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

"Produce" means to manufacture, process, formulate, or repackage.

"Pyrophoric" means a chemical that will ignite spontaneously in air at a temperature of 130°F (54.4°C) or below.

"Responsible party" means someone who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

"Specific chemical identity" means the chemical name, Chemical Abstracts Service (CAS) Registry Number, or any other information that reveals the precise chemical designation of the substance.

"Trade secret" means any confidential formula, pattern, process, device, information or compilation of information that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. Appendix D sets out the criteria to be used in evaluating trade secrets.

"Unstable (reactive)" means a chemical which in the pure state, or as produced or transported, will vigorously polymerize, decompose, condense, or will become self-reactive under conditions of shocks, pressure or temperature.

"Use" means to package, handle, react, or transfer.

"Water-reactive" means a chemical that reacts with water to release a gas that is either flammable or presents a health hazard.

"Work area" means a room or defined space in a workplace where hazardous chemicals are produced or used, and where employees are present.

"Workplace" means an establishment at one geographical location containing one or more work areas.

(d) Hazard determination. (1) Chemical manufacturers and importers shall evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous. Employers are not required to evaluate chemicals unless they choose not to rely on the evaluation performed by the chemical manufacturer or importer for the chemical to satisfy this requirement.

(2) Chemical manufacturers, importers or employers evaluating chemicals shall identify and consider the available scientific evidence concerning such hazards. For health hazards, evidence which is statistically significant and which is based on at least one positive study conducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect if the results of the study meet the definitions of health hazards in this section. Appendix A shall be consulted for the scope of health hazards covered, and Appendix B shall be consulted for the criteria to be followed with respect to the completeness of the evaluation, and the data to be reported.

(3) The chemical manufacturer, importer or employer evaluating chemicals shall treat the following sources as establishing that the chemicals listed in them are hazardous:

(i) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration (OSHA); or,

(ii) Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment, American Conference of Governmental Industrial Hygienists (ACGIH) (latest edition).

The chemical manufacturer, importer, or employer evaluating chemicals is still responsible for evaluating the hazards associated with the chemicals in these source lists in accordance with the requirements of this standard.

(4) Chemical manufacturers, importers and employers evaluating chemicals shall treat the following sources as establishing that a chemical is a carcinogen or potential carcinogen for hazard communication purposes:

(i) National Toxicology Program (NTP), Annual Report on Carcinogens (latest edition);

(ii) International Agency for Research on Cancer (IARC) Monographs (latest editions); or

(iii) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration.

Note: The Registry of Toxic Effects of Chemical Substances published by the National Institute for Occupational Safety and Health indicates whether a chemical has been found by NTP or IARC to be a potential carcinogen.

(5) The chemical manufacturer, importer or employer evaluating chemicals shall determine the hazards of mixtures of chemicals as follows:

(i) If a mixture has been tested as a whole to determine its hazards, the results of such testing shall be used to determine whether the mixture is hazardous;

(ii) If a mixture has not been tested as a whole to determine whether the mixture is a health hazard, the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen under paragraph (d)(4) of this section;

(iii) If a mixture has not been tested as a whole to determine whether the mixture is a physical hazard, the chemical manufacturer, importer, or employer may use whatever scientifically valid data is available to evaluate the physical hazard potential of the mixture; and,

(iv) If the employer has evidence to indicate that a component present in the mixture in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent) could be released in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH

Threshold Limit Value, or could present a health hazard to employees in these concentrations, the mixture shall be assumed to present the same hazard.

(6) Chemical manufacturers, importers, or employers evaluating chemicals shall describe in writing the procedures they use to determine the hazards of the chemical they evaluate. The written procedures are to be made available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director. The written description may be incorporated into the written hazard communication program required under paragraph (e) of this section.

(e) Written hazard communication program.

(1) Employers shall develop and implement a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

(i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and,

(ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

(2) Multi-employer workplaces. Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of another employer may be exposed (for example, employees of a contractor working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:

(i) The methods the employer will use to provide the other employer with a copy of the material safety data sheet for each hazardous chemical the other employer's employees may be exposed to while working;

(ii) The methods the employer will use to inform the other employer of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and,

(iii) The methods the employer will use to inform the other employer of the labeling system used in the workplace.

(3) The employer may rely on an existing hazard communication program to comply with these requirements, provided that it meets the criteria established in this paragraph (e).

This section may be appropriate for employers at worksites with only a few other employers. It is not appropriate or feasible for worksites with dozens of employers moving rapidly on and off the site, as occurs with contractors and subcontractors on many construction sites. OSHA should exempt the construction industry on the basis of feasibility and raise the multi-employer worksite question in a vertical construction standard.

No 1

(4) The employer shall make the written hazard communication program available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director, in accordance with the requirements of 29 CFR 1910.20 (e).

(f) Labels and other forms of warning. (1) The chemical manufacturer, importer, or distributer shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s);

(ii) Appropriate hazard warnings, which convey the specific physical and health hazards (i.e., target organ effects) of the hazardous chemical as defined under paragraph (c) of this section; and

(iii) Name and address of the chemical manufacturer, importer, or other responsible party.

(2) For solid metal (such as a steel beam or a metal casting) ^ that is not exempted as an article due to its downstream use, the required label may be transmitted to the customer at the time of the initial shipment, and need not be included with subsequent shipments to the same employer unless the information on the label changes. The label may be transmitted with the initial shipment itself, or with the material safety data sheet that is to be provided prior to or

add wood

at the time of the first shipment. This exception to requiring labels on every container of hazardous chemicals is only for the solid metal itself and does not apply to hazardous chemicals used in conjunction with, or known to be present with, the metal and to which employees handling the metal may be exposed (for example, cutting fluids or lubricants).

(3) Chemical manufacturers, importers, or distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged, or marked in accordance with this section in a manner which does not conflict with the requirements of the Hazardous Materials Transportation Act (49 U.S.C. 1801 *et seq.*) and regulations issued under that Act by the Department of Transportation.

(4) If the hazardous chemical is regulated by OSHA in a substance-specific health standard, the chemical manufacturer, importer, distributor or employer shall ensure that the labels or other forms of warning used are in accordance with the requirements of that standard.

(5) Except as provided in paragraphs (f)(6) and (f)(7) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s) contained therein; and

(ii) Appropriate hazard warnings, which provide at least general information regarding the hazards of the chemical, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with specific information regarding the physical and health hazards of the hazardous chemical.

(6) The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(5) of this section to be on a label. The written materials shall be readily accessible to the employees in their work area throughout each work shift.

(7) The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, and which are intended only for the immediate use of the employee who performs the transfer.

(8) The employer shall not remove or deface existing labels on incoming containers of hazardous chemicals, unless the container is immediately marked with the required information.

(9) The employer shall ensure that labels or other forms of warning are legible, in English, and prominently displayed on the container, or readily available in the work area throughout each work shift. Employers having employees who speak other languages may add the information in their language to the material presented, as long as the information is presented in English as well.

(10) The chemical manufacturer, importer, distributor or employer need not affix new labels to comply with this section if existing labels already convey the required information.

(g) Material safety data sheets. (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. ~~Employers shall have a material safety data sheet for each hazardous chemical which they use.~~

Downstream employers shall have a material safety data sheet for each substance for which a material safety data sheet is received. If the employer chooses to rely on a MSDS other than the MSDS received with the shipment, the employer is responsible for ensuring that the MSDS complies with this standard.

This language clarifies that downstream employers are not responsible for generating MSDSs for hazardous chemicals they receive. It also clarifies that employers do not have to keep MSDSs if they have a different source or method of presenting the information, such as a computer system. If they choose not to rely on the MSDS, however, the burden of liability for compliance shifts from the upstream distributor to the downstream employer.

? NC

preamble –

label

(2) Each material safety data sheet shall be in English and shall contain at least the following information:

(i) The identity used on the label, and, except as provided for in paragraph (i) of this section on trade secrets:

(A) If the hazardous chemical is a single substance, its chemical and common name(s);

(B) If the hazardous chemical is a mixture which has been tested as a whole to determine its hazards, the chemical and common name(s) of the ingredients which contribute to these known hazards, and the common name(s) of the mixture itself; or,

(C) If the hazardous chemical is a mixture which has not been tested as a whole:

(1) The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise 1% or greater of the composition, except that chemicals identified as carcinogens under paragraph (d)(4) of this section shall be listed if the concentrations are 0.1% or greater; and,

(2) The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise less than 1% (0.1% for carcinogens) of the mixture, if there is evidence that the ingredient(s) could be released from the mixture in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health hazard to employees; and,

(3) The chemical and common name(s) of all ingredients which have been determined to present a physical hazard when present in the mixture;

(ii) Physical and chemical characteristics of the hazardous chemical (such as vapor pressure, flash point);

(iii) The physical hazards of the hazardous chemical, including the potential for fire, explosion, and reactivity;

(iv) The health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical;

(v) The primary route(s) of entry;

(vi) The OSHA permissible exposure limit, ACGIH Threshold Limit Value, and any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the material safety data sheet, where available;

(vii) Whether the hazardous chemical is listed in the National Toxicology Program (NTP) Annual Report on Carcinogens (latest edition) or has been found to be a potential carcinogen in the International Agency for Research on Cancer (IARC) Monographs (latest editions), or by OSHA;

(viii) Any generally applicable precautions for safe handling and use which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, including appropriate hygienic practices, protective measures during repair and maintenance of contaminated equipment, and procedures for clean-up of spills and leaks;

(ix) Any generally applicable control measures which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, such as appropriate engineering controls, work practices, or personal protective equipment;

(x) Emergency and first aid procedures;

(xi) The date of preparation of the material safety data sheet or the last change to it; and,

(xii) The name, address and telephone number of the chemical manufacturer, importer, employer or other responsible party preparing or distributing the material safety data sheet, who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

(3) If no relevant information is found for any given category on the material safety data sheet, the chemical manufacturer, importer or employer preparing the material safety data sheet shall mark it to indicate that no applicable information was found.

(4) Where complex mixtures have similar hazards and contents (i.e. the chemical ingredients are essentially the same, but the specific composition varies from mixture to mixture), the chemical manufacturer, importer or employer may prepare one material safety data sheet to apply to all of these similar mixtures.

(5) The chemical manufacturer, importer or employer preparing the material safety data sheet shall ensure that the information recorded accurately reflects the scientific

evidence used in making the hazard determination. If the chemical manufacturer, importer or employer becomes newly aware of any significant information ~~regarding the hazards of a chemical, or ways to protect against the hazards~~, this new information shall be added to the material safety data sheet within three months. If the chemical is not currently being produced or imported the chemical manufacturer or importer shall add the information to the material safety data sheet before the chemical is introduced into the workplace again.

(6) Chemical manufacturers or importers shall ensure that distributors and employers are provided an appropriate material safety data sheet with their initial shipment, and with the first shipment after a material safety data sheet is updated. The chemical manufacturer or importer shall either provide material safety data sheets with the shipped containers or send them to the employer prior to or at the time of the shipment. ~~If the material safety data sheet is not provided with the shipment, the employer shall obtain one from the chemical manufacturer, importer, or distributor as soon as possible.~~

preparing the material safety data sheet

...sig info could be described in preamble

which would substantially change the potential hazards of the material or the method of protection against the hazards

No —

This badly needed revision would reduce what many feel is the largest paperwork burden of the standard: updating MSDSs. The MSDS should be quickly updated whenever a substantial change in risk or protection becomes known. Updating is not needed everytime a new study comes out unless that study substantially changes the way a worker handles the chemical.

prob in paperwork here was based liability on updates, OSHA updat...

If study indicates new haz - should be -

No

This sentence is deleted because it would shift liability for not shipping an MSDS from the upstream supplier to the downstream user. To comply, the downstream user would be required to evaluate each substance for which no MSDS was received in order to determine if it was "hazardous" and if he should request an MSDS. The hazard evaluation should be the sole responsibility of the manufacturer or importer.

(7) Distributors shall ensure that material safety data sheets, and updated information, are provided to other distributors and employers. Retail distributors shall provide a material safety data sheet to employers purchasing hazardous chemicals upon request, and shall post a sign or otherwise inform them that a material safety data sheet is available.

(8) The employer shall maintain copies of the required material safety data sheets ~~for each hazardous chemical~~ in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

for each chemical for which an MSDS has been received

As before, the downstream user has no way of knowing what chemical are hazardous without relying on MSDS information, unless he performs an independent evaluation. Downstream users should not be required to independently evaluate chemicals.

(9) Where employees must travel between workplaces during a workshift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency.

(10) Material safety data sheets may be kept in any form, including operating procedures, and may be designed to cover groups of hazardous chemicals in a work area where it may be more appropriate to address the hazards of a process rather than individual hazardous chemicals. However, the employer shall ensure that in all cases the required information is provided ~~for each hazardous chemical,~~ and is readily accessible during each work shift to employees when they are in in their work area(s).

for each chemical for which an MSDS has been received

(ii) Material safety data sheets shall also be made readily available, upon request, to designated representatives and to the Assistant Secretary, in accordance with the requirements of 29 CFR 1910.20 (e). The Director shall also be given access to material safety data sheets in the same manner.

(h) Employee information and training. Employers shall provide employees with information and training on ~~hazardous~~ chemicals in their work area at the time of their initial assignment, and whenever a new ~~hazard~~ is introduced into their work area.

[for which an MSDS has been received]

[chemical for which an MSDS has been received]

(1) Information. Employees shall be informed of:

(i) The requirements of this section;

(ii) Any operations in their work area where hazardous chemicals are present; and,

(iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

(2) Training. Employee training shall include at least:

(i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);

(ii) The physical and health hazards of the chemicals in the work area;

(iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and,

(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

(i) Trade secrets. (1) The chemical manufacturer, importer, or employer may withhold the specific chemical identity, including the chemical name and other specific identification of a hazardous chemical, from the material safety data sheet, provided that:

(i) The claim that the information withheld is a trade secret can be supported;

(ii) Information contained in the material safety data sheet concerning the properties and effects of the hazardous chemical is disclosed;

(iii) The material safety data sheet indicates that the specific chemical identity is being withheld as a trade secret; and,

(iv) The specific chemical identity is made available to health professionals, employees, and designated representatives in accordance with the applicable provisions of this paragraph.

(2) Where a treating physician or nurse determines that a medical emergency exists and the specific chemical identity of a hazardous chemical is necessary for emergency or first-aid treatment, the chemical manufacturer, importer, or employer shall immediately disclose the specific chemical identity of a trade secret chemical to that treating physician or nurse, regardless of the existence of a written statement of need or a confidentiality agreement. The chemical manufacturer, importer, or employer may require a written statement of need and confidentiality agreement, in accordance with the provisions of paragraphs (i)(3) and (4) of this section, as soon as circumstances permit.

(3) In non-emergency situations, a chemical manufacturer, importer, or employer shall, upon request, disclose a specific chemical identity, otherwise permitted to be withheld under paragraph (i)(1) of this section, to a health professional (i.e. physician, industrial hygienist, toxicologist, epidemiologist, or occupational health nurse) providing medical or other occupational health services to exposed employee(s), and to employees or designated representatives, if:

(i) The request is in writing;

(ii) The request describes with reasonable detail one or more of the following occupational health needs for the information:

(A) To assess the hazards of the chemicals to which employees will be exposed;

(B) To conduct or assess sampling of the workplace atmosphere to determine employee exposure levels;

(C) To conduct pre-assignment or periodic medical surveillance of exposed employees;

(D) To provide medical treatment to exposed employees;

(E) To select or assess appropriate personal protective equipment for exposed employees;

(F) To design or assess engineering controls or other protective measures for exposed employees; and,

(G) To conduct studies to determine the health effects of exposure.

(iii) The request explains in detail why the disclosure of the specific chemical identity is essential and that, in lieu thereof, the disclosure of the following information to the health professional, employee, or designated representative, would not satisfy the purposes described in paragraph (i)(3)(ii) of this section:

(A) The properties and effects of the chemical;

(B) Measures for controlling workers' exposure to the chemical;

(C) Methods of monitoring and analyzing worker exposure to the chemical; and,

(D) Methods of diagnosing and treating harmful exposures to the chemical;

(iv) The request includes a description of the procedures to be used to maintain the confidentiality of the disclosed information; and,

(v) The health professional, and the employer or contractor of the services of the health professional (i.e. downstream employer, labor organization, or individual employee), employee, or designated representative, agree in a written confidentiality agreement that the health professional, employee, or designated representative, will not use the trade secret information for any purpose other than the health need(s) asserted and agree not to release the information under any circumstances other than to OSHA, as provided in paragraph (i)(6) of this section, except as authorized by the terms of the agreement or by the chemical manufacturer, importer, or employer.

(4) The confidentiality agreement authorized by paragraph (i)(3)(iv) of this section:

(i) May restrict the use of the information to the health purposes indicated in the written statement of need;

(ii) May provide for appropriate legal remedies in the event of a breach of the agreement, including stipulation of a reasonable pre-estimate of likely damages; and,

(iii) May not include requirements for the posting of a penalty bond.

(5) Nothing in this standard is meant to preclude the parties from pursuing non-contractual remedies to the extent permitted by law.

(6) If the health professional, employee, or designated representative receiving the trade secret information decides that there is a need to disclose it to OSHA, the chemical manufacturer, importer, or employer who provided the information shall be informed by the health professional, employee, or designated representative prior to, or at the same time as, such disclosure.

(7) If the chemical manufacturer, importer, or employer denies a written request for disclosure of a specific chemical identity, the denial must:

(i) Be provided to the health professional, employee, or designated representative, within thirty days of the request;

(ii) Be in writing;

(iii) Include evidence to support the claim that the specific chemical identity is a trade secret;

(iv) State the specific reasons why the request is being denied; and,

(v) Explain in detail how alternative information may satisfy the specific medical or occupational health need without revealing the specific chemical identity.

(8) The health professional, employee, or designated representative whose request for information is denied under paragraph (i)(3) of this section may refer the request and the written denial of the request to OSHA for consideration.

(9) When a health professional, employee, or designated representative refers the denial to OSHA under paragraph (i)(8) of this section, OSHA shall consider the evidence to determine if:

(i) The chemical manufacturer, importer, or employer has supported the claim that the specific chemical identity is a trade secret;

(ii) The health professional, employee, or designated representative has supported the claim that there is a medical or occupational health need for the information; and,

(iii) The health professional, employee or designated representative has demonstrated adequate means to protect the confidentiality.

(10)(i) If OSHA determines that the specific chemical identity requested under paragraph (i)(3) of this section is not a *bona fide* trade secret, or that it is a trade secret, but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means to protect the confidentiality of the information, the chemical manufacturer, importer, or employer will be subject to citation by OSHA.

(ii) If a chemical manufacturer, importer, or employer demonstrates to OSHA that the execution of a confidentiality agreement would not provide sufficient protection against the potential harm from the unauthorized disclosure of a trade secret specific chemical identity, the Assistant Secretary may issue such orders or impose such additional limitations or conditions upon the disclosure of the requested chemical information as may be appropriate to assure that the occupational health services are provided without an undue risk of harm to the chemical manufacturer, importer, or employer.

(iii) If a citation for a failure to release specific chemical identity information is contested by the chemical manufacturer, importer, or employer, the matter will be adjudicated before the Occupational Safety and Health Review Commission in accordance with the Act's enforcement scheme and the applicable Commission rules of procedure. In accordance with the Commission rules, when a chemical manufacturer, importer, or employer continues to withhold the information during the contest, the Administrative Law Judge may review the citation and supporting documentation _in camera_ or issue appropriate orders to protect the confidentiality of such matters.

(12) Notwithstanding the existence of a trade secret claim, a chemical manufacturer, importer, or employer shall, upon request, disclose to the Assistant Secretary any information which this section requires the chemical manufacturer, importer, or employer to make available. Where there is a trade secret claim, such claim shall be made no later than at the time the information is provided to the Assistant Secretary so that suitable determinations of trade secret status can be made and the necessary protections can be implemented.

(13) Nothing in this paragraph shall be construed as requiring the disclosure under any circumstances of process or percentage of mixture information which is a trade secret.

(j) _Effective dates_. Chemical manufacturers, importers, distributors, and employers in SIC Codes 20 through 39 were required to be in compliance with all current provisions of this section by May 25, 1986. Employers newly covered under the provisions of this section shall be in compliance no later than one year ~~six months~~ after publication of the final rule in the FEDERAL REGISTER.

APPENDIX A. HEALTH HAZARD DEFINITIONS (Mandatory)

Although safety hazards related to the physical characteristics of a chemical can be objectively defined in terms of testing requirements (e.g. flammability), health hazard definitions are less precise and more subjective. Health hazards may cause measurable changes in the body—such as decreased pulmonary function. These changes are generally indicated by the occurrence of signs and symptoms in the exposed employees—such as shortness of breath, a non-measurable, subjective feeling. Employees exposed to such hazards must be apprised of both the change in body function and the signs and symptoms that may occur to signal that change.

The determination of occupational health hazards is complicated by the fact that many of the effects or signs and symptoms occur commonly in non-occupationally exposed populations, so that effects of exposure are difficult to separate from normally occurring illnesses. Occasionally, a substance causes an effect that is rarely seen in the population at large, such as angiosarcomas caused by vinyl chloride exposure, thus making it easier to ascertain that the occupational exposure was the primary causative factor. More

The effective date of the expanded standard should be at least one year to allow the non-manufacturing sectors time to establish training and hazard communication programs.

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The effective date of the expanded standard should be at least one year to allow the non-manufacturing sectors time to establish training and hazard communication programs.

The CHAIRMAN. Did OMB try to exempt employees who are not routinely exposed to hazardous substances from the standard?

Ms. SILK. Yes, they did.

The CHAIRMAN. And did OMB also try to exempt the construction industry and the retail industry from the standard?

Ms. SILK. Yes, they did.

The CHAIRMAN. And what effect would these changes have made?

Ms. SILK. Well, obviously, the employees who would be working in those sectors would not be getting the same protection as employees in other sectors who would be covered by the rule.

The CHAIRMAN. How many workers are we talking about in that sector; do you know offhand?

Ms. SILK. I do not, although there are a lot of workers in construction.

The CHAIRMAN. Yes. We will include that in the record.

Were you able to resist most of the OMB's changes because of the imminent court deadline?

Ms. SILK. Yes. We reached a point where we had exhausted all of our legal remedies, so we would in essence have been held in contempt of court if we had not issued the final rule.

The CHAIRMAN. And did OSHA publish a final standard in 1987 without any changes that would have weakened the standard?

Ms. SILK. Yes, we did.

The CHAIRMAN. And after the standard was published, did OMB hold its own public hearing on the paperwork burden of the new standard?

Ms. SILK. Yes, they did.

The CHAIRMAN. That is over on the board—"Rulemaking Process". You can see we show the three phases where OMB comes into play, and under the final rule, the last entry, it comes back to OMB under the Paperwork Reduction Act. So this is their third bite of the apple.

Has OMB ever held public hearings before regarding the paperwork burden on any other OSHA health standard?

Ms. SILK. No. To my knowledge, they have only had four hearings total under the Paperwork Reduction Act, and two of them were on hazard communication.

The CHAIRMAN. Two of the four; half of all of their public hearings were on reduction of paperwork on this particular standard.

Now, did OSHA already have an extensive public record developed?

Ms. SILK. Yes. We have been working on it since 1974, so we have literally file cabinets' worth of material.

The CHAIRMAN. And did OMB subsequently send a 14-page letter to OSHA, disapproving major provisions of the new standard under the Paperwork Reduction Act?

Ms. SILK. Yes, they did.

The CHAIRMAN. And this is the item—it is 14 pages long.

[The letter referred to follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCT 28 1987

Honorable Thomas C. Komarek
Assistant Secretary for
  Administration and Management
Department of Labor
Washington, D.C. 20210

Dear Tom:

Pursuant to the Paperwork Reduction Act (44 U.S.C. Chapter 35), we have completed our review of the collection of information requirements in the Occupational Safety and Health Administration's Hazard Communication Standard (HCS), which were submitted to us by your office on September 10, 1987. We notified the Department of our decision on October 23, 1987. This letter explains in greater detail our October 23rd decision and transmits the record of our October 16, 1987 public hearing on the HCS together with the written comments we have received.

As proposed by OSHA on March 19, 1982, and promulgated as a final rule on November 25, 1983, the HCS applied only to the manufacturing sector of the economy. Pursuant to a court order, OSHA promulgated on August 24, 1987 a new final HCS based on the record developed in response to the original proposal. This most recent final rule differs substantially from the original proposal because it applies to the non-manufacturing sector as well.

On September 10, 1987, you submitted for the first time the paperwork provisions in the revised final rule for OMB review. Thus, you asked us to reinstate previously approved paperwork covering the manufacturing sector, for which OMB approval expired on June 30, 1987, and to approve an additional 28.7 million hours of new paperwork covering the non-manufacturing sector. In addition, we are asked to approve new paperwork for the manufacturing sector that apparently went into effect 30 days after publication of the new final rule, without approval under the Paperwork Reduction Act.

Our review of the paperwork provisions in the expanded standard has confirmed our support and earlier approval of the original Hazard Communication Standard in 1983, and our belief in its importance in reducing occupational illnesses and injuries by ensuring that workers are informed about the hazards of substances to which they may be exposed on the job. As OSHA has long recognized, however, this deceptively simple goal becomes exceedingly complicated when applied to millions of different worksites, work conditions, and products across the country. I commend the Department for continuing to adopt a performance-oriented approach to hazard communication that allows employers flexibility in complying with the rule, and for tailoring the expanded rule to adapt the flow of information more appropriately to some of these worksites and products.

Decision

Your request for OMB review of the HCS paperwork provisions has raised difficult issues. The Department promulgated a final rule under an order from the U.S. Court of Appeals for the Third Circuit, but failed to follow the approval procedures required in Section 3504(h) of the Paperwork Reduction Act. The explicit purpose of Section 3504(h) is to establish a mechanism to coordinate rulemakings and Paperwork Reduction Act reviews. Section 3504(h) allows OMB to disapprove any collection of information requirement where the agency has substantially modified in the final rule the collection of information requirement in the proposed rule if the agency has not submitted the modified requirement to OMB for review at least 60 days prior to issuance of the final rule. These procedures for prior review are intended to avoid the difficult situation in which, after rulemakings are completed, further rulemaking may be necessary if we cannot approve the paperwork components of the rule. The Department's failure to comply with these procedures prior to publication is particularly unfortunate given the Third Circuit's concern that the final rule not be further delayed. In the course of our review, we have carefully weighed our obligations under the Paperwork Reduction Act and the concern of the court that the final standard should take effect without unreasonable delay.

As you know, the Paperwork Reduction Act requires that agencies of the Federal government obtain OMB approval before conducting or sponsoring a collection of information. Under the Act and implementing regulations at 5 CFR 1320, we are required to determine that the paperwork requirements have practical utility, that they are the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives, and that they do not duplicate information otherwise available. Section 3512 of the Act protects the public from penalties resulting from failure to comply with collection of information requirements that are not approved under the Act.

During our review of the HCS, we conducted public meetings on the proposed paperwork provisions on April 2, 1987, and October 16, 1987, and reviewed numerous written comments. We have carefully analyzed this record, which provides additional information and new perspectives on the record upon which OSHA based the expanded rule, and, as required by the Act, have based our decision upon it. We have determined that the record does not support certain paperwork provisions and would not allow approval. Hence, pursuant to Section 3504(h)(5)(D) of the Paperwork Reduction Act and 5 CFR 1320.13(g) of the implementing regulations, we have disapproved, effective May 23, 1988, the following collection of information requirements:

- o the requirement that material safety data sheets be provided on multi-employer worksites;
- o coverage of any consumer product excluded from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986;
- o coverage of any drugs regulated by FDA in the non-manufacturing sector.

Our disapproval takes effect on May 23, 1988, the date on which the expanded standard takes effect for the non-manufacturing sector. In the rulemaking required below, we believe the Department should take action under the Administrative Procedures Act to revise these requirements prior to the effective date (below, we suggest alternatives that may be consistent with the Paperwork Reduction Act) or collect new information that would warrant a reconsideration of our decision under the Paperwork Reduction Act.

We have approved all other paperwork requirements through May 23, 1988, but have determined that reconsideration of the definition of "article" is needed in order to achieve consistency with the Act. Therefore, pursuant to 1320.14(f) and (g) of the implementing regulations, we are instructing the Department to complete a rulemaking on this and other issues, including issuance of a notice of proposed rulemaking and a final rule. The rulemaking shall examine, at least, alternatives to the definition of "article," including a de minimis exemption and clarification of the concept of "normal use," and should conform the provisions of the rule relating to the manufacturing sector to the requirements in the non-manufacturing sector in light of this decision. In the course of this rulemaking, the Department shall comply with Section 3504(h) procedures to accommodate the needs of both the Administrative Procedures Act and the Paperwork Reduction Act. Our approval is conditioned on adherence to the following schedule for consideration of these paperwork provisions:

December 1, 1987:	Publication in the Federal Register of a notice of proposed rulemaking to reconsider certain paperwork provisions of the HCS and submission of paperwork to OMB for review
January 31, 1988:	Public comment period on NPRM closes
March 1, 1988:	Publication in the Federal Register of a final rule concerning the HCS; paperwork submitted to OMB for review

Although this schedule is tight, it is very important that OSHA conclude its rulemaking to revise the standard, giving OMB sufficient time to complete review of the final paperwork provisions and the public sufficient time to understand and implement the revisions prior to the effective date of the standard.

Generic Hazard Communication Programs

Many commenters spoke forcefully about widespread confusion in the regulated community, particularly among small businesses, regarding their responsibilities under the HCS. Some, for example, were unsure who would be responsible for the accuracy of the MSDS information--the generator or the downstream user (1-24). Others stated that a certification or technical assistance effort was needed to give employers confidence that their efforts were in compliance with the HCS. Still others mentioned that the Federal Government had developed a Federal Generic Hazard Communication program, which contains step-by-step instructions for implementing the HCS, a model written program, and an HCS training program, in order to reduce Federal agency costs in complying with the HCS, and that a similar approach may be useful for the private sector. In fact, the single issue on which every commenter who addressed the issue agreed was the need for some sort of non-mandatory guidance from OSHA on the development of hazard communication programs (see e.g. comments by the Small Business Administration, the Organization of Resources Counselors, AFL-CIO, National Association of Home Builders, National LP-Gas Association, American Farm Bureau Federation, Associated General Contractors of America, Associated Builders and Contractors; National Association of Wholesaler-Distributors; Petroleum Marketers Association of America, National Automobile Dealers Association, National Paint and Coatings Association, and the American Subcontractors Association, Inc.).

These comments strongly suggest that administrative actions by OSHA could reduce the paperwork compliance burden associated with the information collection provisions. Although we do not have sufficient information to determine what administrative action would be most appropriate, we believe that OSHA should examine several options, while relying to the extent possible on the private sector. We believe OSHA should consider working with the appropriate public and private groups, as well as existing OSHA advisory groups, in developing a suitable approach. Options may include the development of a generic hazard communication program or guidelines suitable for the development of generic programs by the private sector and by States, which could perhaps be certified as meeting the requirements of the HCS. Certification of private sector generic programs would continue to encourage the private market to develop programs, while also offering the employer some guarantee that the program purchased meets OSHA's expectations for compliance. OSHA could also make available any generic guidelines that were developed to any employer wishing to design his or her own plan.

Such an administrative effort by OSHA could substantially reduce the start-up paperwork burden and costs of the HCS, particularly those of small businesses. The Small Business Administration, for example, estimated that a generic program could reduce first year program development costs by 50 percent and training costs by 25 percent, for a total first-year savings of $700 million (2-42). A generic program could also facilitate employer compliance at the earliest possible date and improve the effectiveness of programs that are developed. Although we do not believe that the Federal Government should compete with the private market that has already developed generic hazard communication programs, we believe that a great deal can be done within the boundaries of OSHA's limited resources either to supplement the private sector or to improve the usefulness of private sector programs.

By January 1, 1988, OSHA should submit a plan, which has been developed in consultation with the U.S. Small Business Administration and the Secretary of the Department of Commerce, for an administrative effort that would provide such assistance as appropriate to alleviate the start-up paperwork burdens and costs. The plan should include an outline of the intended approach and a timetable of actions necessary to complete the effort by the date of publication of the revised final rule and have it available to the regulated community. With the resubmission of the collection of information requirements in the final rule, OSHA should also submit a description of the plan and any documents necessary to implement it. We look forward to working with you to meet this condition of paperwork approval as efficiently and effectively as possible.

Discussion

Following is a discussion of the record and the reasons for our decisions under the Paperwork Reduction Act.[1]

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[1] All exhibit numbers are references to OMB paperwork docket 1218-0072, which is available to the public in Room 3201, New Executive Office Building, Washington, D.C. The prefix "1" indicates that the exhibit was received in response to the April 2, 1987, public meeting, and the prefix "2" indicates that the exhibit was received in response to the October 16, 1987, public meeting.

Multi-Employer Workplaces

The HCS relies heavily on the encyclopedic Material Safety Data Sheet (MSDS) as the primary mechanism for transmitting hazard information to employers and employees. This approach is appropriate when workers face the likelihood of significant exposure to a relatively small number of chemical hazards. Other transmittal mechanisms, however, such as generalized hazard training, are likely to be equally or more effective with much less paperwork burden when the particular hazards are continually changing or when many potentially hazardous substances are present in small quantities. In such circumstances, MSDSs have little, if any, practical utility, because neither employers nor employees can predict what, where or when exposures are likely to occur or consult the MSDS before deciding how to handle the substance. Unfortunately, these are exactly the situations where the burden of maintaining and updating MSDSs would be heaviest.

The effectiveness and efficiency of the MSDS as a source of information in various situations is disputed by a number of commenters. For example, several commenters questioned the practical utility of the provision governing multi-employer workplaces such as construction sites (1910.1200(e)(2)), which requires each employer to provide MSDSs at the workplace. The commenters stated that having the MSDS physically at the worksite would almost certainly be useless. They maintained that coordination and transfer of the MSDSs, either between employers or in a central location would be very difficult, primarily due to the numbers of employees and substances and the great frequency with which employees would arrive at and leave the site (Ex. 1-14, p. 85; 2-41; 2-48; 2-49). For example, some employees would be on-site for a few hours; others for months. Some employees would arrive directly from another worksite rather than from a central location. Other commenters (Ex. 1-14, p. 94) expressed doubt as to the need to have MSDSs actually on the site if they were available elsewhere or if the information were available by phone or computer, an approach that the HCS permits for employees of a single employer who work at multiple locations (1910.1200(g)(9)). Similar problems were described by commenters with regard to mobile service personnel, such as repairmen, and professional launderers.

These commenters also questioned OSHA's estimates of the number of MSDSs required in multi-employer workplaces. One commenter estimated that a single industrial launderer might need to keep on file 10,000 to 50,000 MSDSs (Ex. 2-17) because delivery personnel could be exposed to different hazards at each location where they pick up or deliver laundry. The commenter estimated that the annual costs of compliance would be far higher than OSHA's estimated second-year cost of $16 per establishment. Another commenter stated that it would not be feasible for a mobile service employee to have hard copies of MSDSs for all hazardous chemicals in the vehicle (Ex. 2-13). Several representatives of the construction industry estimated that a minimum of several file cabinets would be required on a construction site to maintain the MSDSs, and that compliance may be physically impossible (see, for example, comments by Associated General Contractors of America, 2-29; and Associated Builders and Contractors, 2-30).

In light of these objections, neither the preamble to the final rule nor the justification statement in the request for OMB paperwork review demonstrate the practical utility for the requirement to bring MSDSs on-site at multi-employer workplaces. Moreover, the requirement does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces. Hence, the requirement to bring MSDSs onto multi-employer worksites is disapproved effective May 23, 1988.

One approach that would be consistent with the Paperwork Reduction Act would be the addition of a third option to paragraph (e)(2)(i), in addition to the option of trading MSDSs between employers or depositing them in a central location. This third option would require employers at multi-employer worksites to keep labels intact on any containers they bring onto the worksite; to train their employees in the hazards with which they work directly, in recognition of and response to the general hazards that are likely to be introduced by other employers, and in the need to observe hazard labels on the worksite and request MSDSs when further information is needed; and to provide MSDSs to other employers upon request. Given the high rate of turnover in affected industries, such training should be transferable from worksite to worksite (Exs. 1-15, 2-21, 2-30).

This approach would ensure that all employees at a worksite would have access to all MSDSs upon request. This approach relies on labels and general hazard training to protect workers from substances brought onsite by other employers. It also leaves intact OSHA's existing requirement at (e)(2)(ii) that employers inform other employers of any precautionary measures that need to be taken to protect employees, and therefore ensures that workers are protected from unusual hazards at a multi-employer worksite, as well as the normal hazards that would be included in a generalized training program.

Consumer Products

OSHA exempts from this final rule any consumer product where "the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers" (1910.1200(b)(6)(vii)). This is a new exemption not contained in the existing rule, and is appropriately intended to exclude the large numbers of consumer products found in non-manufacturing workplaces. Nonetheless, this exemption is limited to consumer products that are used under certain circumstances, and hence the HCS would continue to apply to numerous consumer products present in workplaces.

The record indicates that this exemption would continue to place under the HCS large numbers of consumer products for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial. We have four major concerns:

- o Consumer product labeling already provides information to identify significant hazards that may result from use of the product and to enable users to avoid those hazards. For the overwhelming majority of consumer products that would remain subject to the standard, there is no evidence in the record that the MSDS would have practical utility beyond the information already included on the label.

- o The exemption imposes a burden on the employer to "demonstrate" that exposures for each substance are the same as "normal consumer use," a burden that may be difficult to meet (2-44). More importantly, such a trigger would not exclude many situations where risks are very low. For example, is an employee who cleans and waxes floors once a week using a supermarket product exposed at the same duration and frequency as consumers? If not, should the employee be trained in the hazards of floor wax? Under OSHA's language, the employee may well be treated exactly like a worker on a chemical production line. In addition, the HCS requires that even consumer products that are not opened under normal workplace use, such as those a stock boy places on a supermarket shelf, be treated as "sealed containers," for which MSDSs and hazard training for potential spillage are required. This would result in treating a can of floor wax in a grocery store exactly the same as a 55-gallon drum of industrial chemical in a warehouse. In this regard, the National Retail Merchants Association stated, "It would be exceptionally difficult for retailers to adequately assess whether the hundreds of products they regularly sell could potentially become workplace hazards in the event of spillage" (Ex. 1-24, see also comments by the National Restaurant Association, 2-31).

- o The exemption does not allow upstream suppliers to determine which products are exempted, because they do not know how downstream employers will use them. Moreover, OSHA's explanation that downstream distributors who do not "generally" sell to employers would not be covered offers no relief to wholesalers and other consumer product distributors who have some accounts that are subject to the standard and others that are not. In fact upstream suppliers who want to ensure compliance will have no practical alternative but to assume that downstream employers are covered, and will therefore ship MSDSs and labels along with all consumer products. Thus, upstream suppliers will continue to bear all of the costs and the distribution/retail sector will continue to receive all of the hazard information for all consumer products. This is exactly what the consumer product exemption should be designed to avoid.

- o The number of MSDSs involved is very large. Although OSHA estimated that the typical food store contained 11 chemical hazards and the largest 58, the Food Marketing Institute estimated that the typical supermarket would sell at least 1,200 nonfood consumer products that may be covered by the HCS (Ex. 2-32). The National Paint and Coatings Association calculated that paint manufacturers would be required to supply 7,000,000 MSDSs initially to retail establishments (Ex. 2-38).

We have therefore disapproved, effective May 23, 1988, coverage under the HCS of any consumer product excluded by Congress from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986 (SARA): "Any substance to the extent it is used for personal, family or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public." This language would exempt any substance packaged in the same form and concentration as a consumer product whether or not it is used for the same purpose as the consumer product. EPA concluded in its final rule on Sections 311 and 312 of SARA (52 FR 38344) that this exemption is appropriate for household or consumer products in commercial and industrial as well as household use because "the public is generally familiar with such substances, their hazards and their likely locations, (hence) the disclosure of such substances is unnecessary for right-to-know purposes." This alternative consumer products exemption would address the concern that the current HCS imposes unnecessary paperwork in many situations in which exposures and risks are trivial, and would reduce and simplify the paperwork requirements:

- o It makes the OSHA and EPA right-to-know paperwork requirements, which are closely linked, mutually consistent. Using the same exemption in both rules avoids the situation in which employers must separate the paperwork for their "consumer products" into two groups: an OSHA "consumer product" and an EPA "consumer product."

- o It establishes objective criteria that enable upstream and downstream employers to determine what is exempted and what is included. Upstream suppliers would not be forced to speculate as to the identity of the final user (consumer or employer?) in determining whether the product is subject to the HCS. The flow of MSDSs and labels would be restricted to unpackaged substances or substances packaged for industrial or commercial use, for which detailed hazard information would be expected to have practical utility.

Drugs Regulated by FDA

The standard exempts drugs in "solid, final form for direct administration to the patient (i.e., tablets or pills)." This exemption in part avoids duplication of paperwork. Drugs for human consumption are heavily regulated by the Food and Drug Administration, which requires the transmittal of detailed information downstream from the manufacturer through professional package inserts and labels. The exemption also limits the odd situation in which a drugstore owner would be responsible for training professional pharmacists about the hazards of the drugs they dispense.

Outside the manufacturing sector, however, both rationales are equally relevant to liquid drugs or drugs not in final form. OSHA does not explain why all drugs regulated by the FDA are not exempted, except to say that North Carolina has adopted a similar exemption. Yet the paperwork burdens of covering such drugs appear to be very high. The National Wholesale Druggists Association has estimated that each drug wholesaler, with 400 pharmacy customers and 12,000 individual products covered by the HCS, would initially be required to distribute 4.8 million MSDSs (Ex. 2-24). If capsules containing solids or liquids are covered by the HCS, another 5,520 products would be added. A similar concern was raised by the Department of Agriculture (Ex. 2-50) and the Animal Health Institute (Ex. 2-40) concerning potential duplication of paperwork for veterinary biological products. Since coverage of any FDA-regulated drug would result in duplicative paperwork and is unlikely to provide additional information of any practical utility, we have disapproved coverage of FDA-regulated drugs outside the manufacturing sector, effective May 23, 1988.

Definition of "Article"

The HCS exemption of "articles" from the scope of the standard is conditionally approved through May 23, 1988. Although the record supports the need for an article exemption, the record does not support the existing definition of "article," particularly with regard to the lack of a de minimis exemption and the agency's interpretation of "normal conditions of use."

"Article" is defined as "a manufactured item: (1) which is formed to a specific shape or design during the manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result, in exposure to a hazardous chemical under normal conditions of use." OSHA explains in the preamble to the final expanded rule that "exposure" does not mean releases of "very small quantities," a "trace amount," or "a few molecules" of the hazard.

The issue raised in the record is whether an objective "de minimis" exemption should be added to the definition of "article," perhaps similar to the quantity threshold used to define "de minimis" quantities in mixtures. OSHA exempts from the HCS substances which comprise less than one percent of a mixture (0.1 percent if the substance is a carcinogen), unless "there is evidence that the ingredient(s) could be released from the mixture in concentrations which would exceed an established OSHA permissible exposure limit (PEL) or ACGIH Threshold Limit Value (TLV), or could present a health hazard to employees" (1910.1200(g)(2)(i)(C)(1) and (2)). The one percent exclusion was included in the HCS, OSHA explained in the preamble to the 1983 final rule, "to absolve the employer from having to evaluate and list chemicals present in mixtures in small quantities, which are not likely to result in substantial exposures...the one percent cutoff was justified on the basis that it appeared to be protective and was considered to be reasonable by a number of affected parties" (48 FR 53290).

The record contains a number of statements that the absence of similar "de minimis" language in the definition of "article" results in the standard covering many items containing small amounts of hazardous substances and presenting low exposures to workers (one commenter noted that even the Federal Register volume in which the HCS was published emitted a measurable amount of formaldehyde, Ex. 1-25, see also Exs. 1-14, pp. 49-55; 2-36; 2-44). The lack of consistency between mixtures and articles also poses the anomalous possibility that exempt substances in a liquid or powdered mixture will become subject to the HCS when shaped or incorporated into a solid article, although the possibility of employee exposure is almost surely reduced.

The evidence is convincing that the current definition of "article" would indeed result in the inclusion of many items that present trivial risks, and that OSHA's preamble discussion of the issue is insufficient to exclude those items. It is particularly compelling that OSHA has in essence included a "de minimis" exemption for mixtures, for reasons that appear to apply equally well to manufactured items. Hence, the current "article" exemption appears to include many items under the HCS for which the paperwork requirements would have no practical utility.
We therefore believe that OSHA should reconsider the definition of article. An approach more consistent with the Paperwork Reduction Act would exclude de minimis exposures expressly, and define such exposures in the same terms used in the exclusion for trace components of mixtures. This approach would result in a consistent treatment of solids and chemical mixtures under the standard by exempting many items that emit small amounts of potentially hazardous substances, but not in sufficient quantities to result in significant exposures. It may also result in lower exposures by encouraging manufacturers to reduce trace elements to below the threshold. The Department is instructed to complete by March 1, 1988 a rulemaking to reconsider a de minimis exemption in the definition of "article."

A related issue that appears to cause confusion in the regulated community is the coverage of items such as metal or plastic pipes. These objects would appear to be "articles" since they are formed to a specific shape or design, are dependent for their end-use function on their shape or design, and would not release or otherwise result in exposure to hazardous chemicals under normal conditions of use, that is, when functioning as pipes. Yet, in a new provision exempting solid metals from labeling requirements under certain conditions, OSHA has added language that appears to suggest that such items are not "articles" if workers could be exposed to a hazard during operations such as installation or alteration of the item.

OSHA apparently intended this interpretation to address situations in which downstream employees who shape, cut, drill, or otherwise handle the solid object could be exposed to hazards, and would therefore require substance-specific hazard information about each solid object. OSHA's preamble discussion suggests that only potential exposures related to installation need be considered by the upstream supplier; the supplier does not need to consider "the possibility that exposure could occur when the item is repaired or worked on" (52 FR 31865). Nowhere does this distinction appear in the rule, however, and the question arises as to whether a practical distinction can be drawn between "installing," "working on," and "repairing."

It is difficult to understand why OSHA would consider such operations "normal conditions of use." If "normal conditions of use" apply to any possible exposure to any worker downstream, then the "article" exemption is exceedingly limited. Since manufacturers and distributors would have no way of knowing how downstream employers will treat or change the solid object, then, regardless of its hazard during its intended use, the object would be covered under the HCS, and MSDSs and labels would accompany it. The result of this interpretation would be a flood of paperwork accompanying solid objects that under normal conditions of use present no hazard at all. "Contractors will be virtually buried in MSDSs," stated the American Supply Association (Ex. 2-25).

Within the manufacturing sector, where solid objects may constitute the raw materials for extensive further processing, there may be some utility to this flow of information. Outside the manufacturing sector, however, the practical utility even in cases where such workers may be exposed seems dubious at best, and certainly has not been demonstrated in the record. Consider the case of a repairman who replaces pipe. To cut and remove existing pipe safely, he must have sufficient information and training to recognize different types of pipe and the hazards they may pose without benefit of a substance-specific MSDS or a label on the pipe. He needs no additional information to install the new pipe safely. Clearly, in these cases the repairman would benefit far more from generic hazard training on pipes than from

access to substance-specific information on new pipes. In such circumstances, it is difficult to see that the practical utility is sufficient to balance the paperwork burden imposed.

The record suggests that the detailed substance-specific information provided on the MSDS can be useful in a controlled work environment, such as a manufacturing facility, in which the employer knows what hazards are present and where. Detailed substance-specific information does not, however, seem to offer much practical benefit in uncontrolled environments, such as that faced on a construction site or by a repairman, where the employer knows generally but not specifically what hazards the employee will face, or when, or where. In uncontrolled situations, generic hazard training seems much more relevant to protecting workers from the array of hazards they may face and the materials handling decisions that they must make throughout the workday.

Outside the manufacturing sector, there is likely to be little practical utility to a requirement that MSDSs and labels accompany solid objects that would be "articles" under normal conditions of use. Although one possible option would be to define all such items as "articles" exempt from the standard, there may be alternatives, such as reliance on general hazard training, that would also be consistent with an employee's need to know and the requirements of the Paperwork Reduction Act. The Department is instructed to complete by March 1, 1988, a rulemaking to reconsider its present interpretation of "normal consumer use" and fully explore these alternatives. In addition, if OSHA believes that further rulemaking is needed in specific cases to protect downstream users who handle or modify particular "articles," we look forward to assisting OSHA in developing a means for transmitting hazard information that is consistent with the Paperwork Reduction Act.

A similar concern has been expressed with regard to scrap metal, which appears to present special problems (1-22). Not only does scrap metal contain a great many substances, requiring voluminous MSDS and labels, but it also appears to pose little risk of significant exposure. We suggest that scrap metal that was classified as an "article" before it became scrap continue to fall under the "article" exemption.

Summary

In summary, the record does not demonstrate that certain paperwork requirements meet the criteria established in the Paperwork Reduction Act and its implementing regulations. Hence, we are disapproving the following paperwork requirements in the HCS, effective May 23, 1988:

- the requirement that material safety data sheets be provided on multi-employer worksites;
- coverage of any consumer product that falls within the "consumer products" exemption included in Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986;
- coverage of any drugs regulated by FDA in the non-manufacturing sector.

We are approving the remainder of the paperwork provisions in the HCS until May 23, 1988, on the condition that the agency complete rulemaking according to the schedule detailed earlier. The rulemaking shall consider, at least, alternatives to the definition of "article," including a de minimis exemption and clarification of the concept of "normal conditions of use," and shall conform the requirements on the manufacturing sector with the requirements on the non-manufacturing sector in light of this decision.

The Department shall, pursuant to 1320.13(j) and 1320.14(f), publish a notice in the Federal Register on the next practicable publication date to inform the public of OMB's decision under the Paperwork Reduction Act. The notice shall include the text of this letter and any other information the Department feels is necessary and appropriate.

We look forward to working with you and your staff to ensure that the collection of information provisions of the HCS meet the goal of protecting employees from hazardous exposures in a manner consistent with the requirements of the Paperwork Reduction Act.

Sincerely,

Wendy L. Gramm

Wendy L. Gramm
Administrator for Information
and Regulatory Affairs

cc: Honorable John A. Pendergrass
Assistant Secretary for
Occupational Safety and Health

Honorable C. William Verity
Secretary of the Department of Commerce

Honorable James Abdnor, Administrator for
Small Business Administration

The CHAIRMAN. What happens when OMB disapproves a provision under the Paperwork Reduction Act?

Ms. SILK. We cannot enforce those provisions.

The CHAIRMAN. And by this letter, did OMB disapprove the requirement for providing material safety data sheets on multi-employer work sites?

Ms. SILK. Yes, they did.

The CHAIRMAN. And did OMB economists try unsuccessfully to change that requirement just weeks before when they were reviewing the final standard?

Ms. SILK. Yes.

The CHAIRMAN. In your opinion, does OMB's disapproval of that provision make the standard less protective?

Ms. SILK. Yes, I think it does.

The CHAIRMAN. So OMB tried at one level to disapprove certain provisions, and they couldn't do that; and so then they came back under the Paperwork Reduction Act, made those provisions unenforceable.

Did OMB also disapprove coverage of consumer products?

Ms. SILK. Yes, they did.

The CHAIRMAN. And did OMB economists try unsuccessfully to change that requirement just weeks before the final standard?

Ms. SILK. Yes, they did.

The CHAIRMAN. In your opinion, does OMB's disapproval of consumer products make the standard less effective?

Ms. SILK. Yes, it does.

The CHAIRMAN. How much paperwork would actually be eliminated if OMB's changes suggested in the letter were implemented?

Ms. SILK. No one knows. A very sophisticated analysis was done for this rule which involves a lot of substances. There really is no way to sort out those few substances that they have disapproved from the gross estimate of 575,000 hazardous chemicals in the workplace.

So there is no discernible change in the paperwork.

The CHAIRMAN. And did OMB provide any estimates of paperwork savings to justify their action?

Ms. SILK. No; in their 14-page letter they never mentioned any specific numbers in terms of paperwork burden at all.

The CHAIRMAN. So OSHA successfully resisted OMB's changes to the final standard before it was published, but then right after publication, OMB came back under the paperwork reduction act in a thinly veiled attempt to force OSHA to make the same changes they had resisted earlier; is that correct?

Ms. SILK. Yes, it is.

The CHAIRMAN. In the same letter did OMB threaten to disapprove the entire hazard communication standard in the nonmanufacturing sector if OSHA did not reopen rulemaking and adhere to a timetable laid out in the letter for making the changes to the standard?

Ms. SILK. Yes, they did.

The CHAIRMAN. Has OSHA already missed the deadline OMB demanded?

Ms. SILK. Yes, we have.

The CHAIRMAN. So according to the letter OMB was planning to disapprove the entire hazard communication standard; is that correct?

Ms. SILK. Yes, they were planning to.

The CHAIRMAN. I understand that just a few days ago, on the eve of these oversight hearings, OMB approved the paperwork requirements through 1991 for all but a few issues raised in the letter?

Ms. SILK. That is true.

The CHAIRMAN. What would have happened to enforcement of the new standard if they had carried out their threat in the letter?

Ms. SILK. We would not have been able to enforce, and we also would not have been able to enforce the old standard for manufacturing, because that disapproval would have gone into effect then too.

The CHAIRMAN. So they effectively would have emasculated the 14 years or more of work that has been done to deal with this extraordinarily important health issue for hundreds of thousands of workers.

Is OSHA now reopening the rulemaking on the hazard communications standard, at the direction of OMB?

Ms. SILK. Yes, we are.

The CHAIRMAN. Have you prepared a proposal?

Ms. SILK. Yes, we have.

The CHAIRMAN. And what is the status of the proposal?

Ms. SILK. The proposal was transmitted to OMB for review on March the 3rd, and they have not yet responded.

The CHAIRMAN. Could I have that once again? Could you bring the mike up a little closer?

Ms. SILK. Sorry. We transmitted it to OMB for review on March the 3rd, and they have not responded yet.

The CHAIRMAN. They have not responded? Does the Paperwork Reduction Act allow OMB to interfere with the substance of OSHA's decision-making?

Ms. SILK. Well, the act specifically says that they're not supposed to.

The CHAIRMAN. The act says, nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the office of Management and Budget, or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies, and offices. So the Statute states clearly that they should not be able to override these health standards.

Do you think OMB exceeded its sta[illegible]tory authority?

Ms. SILK. I think if you go back a[illegible] read the original intent of the paperwork reduction act, what it says is that when people have to fill out forms and send them to the government, there needs to be a practical utility to the government for that information.

This standard certainly has nothing to do with that. These paperwork determinations have to do with giving information to workers, and the changes do reduce protection.

The CHAIRMAN. Do you think OMB's actions under the paperwork reduction act will have a chilling effect on future OSHA standard setting?

Ms. **Silk**. I think they have already had an effect on OSHA standard setting, because we certainly take that into consideration when we draft provisions.

And in essence, what we have is a conflict between the mandate of the paperwork reduction act and how it is being interpreted and the mandate of the Occupational Safety and Health Act to protect employees to the extent feasible.

Senator **Metzenbaum**. Dr. Harwood and Ms. Silk, a couple of questions.

When OMB reverses your position, does it ever suggest that it is acting to promote health objectives? Do you have any recollection of their ever saying that?

Dr. **Harwood**. I never recall that being given as a motivation for any change.

Senator **Metzenbaum**. Ms. Silk?

Ms. **Silk**. Neither do I.

Senator **Metzenbaum**. And does it at times cite employer cost as its rationale? Dr. Harwood?

Dr. **Harwood**. Yes, sometimes—quite often it is cost.

Senator **Metzenbaum**. Ms. Silk?

Ms. **Silk**. Yes, cost is a consideration.

Senator **Metzenbaum**. Under those circumstances, do you believe that OMB probably has a different agenda than do those charged with the responsibility of administering the OSHA Act, and that OMB has more of an employer protection concern than a worker health concern?

Dr. **Harwood**. Clearly, we do have different responsibilities and different things to be concerned about.

Senator **Metzenbaum**. And as Senator Kennedy has already pointed out, OMB's concerns are not merely with respect to paper reduction, but really are more concerned with the whole approach to the question of employee protection, and might even be considered more concerned about employer protection.

Ms. Silk?

Ms. **Silk**. I think that certainly is a possibility. One of our concerns, at least one of my concerns, is that we have a very deliberative rulemaking process. We are often considered to be slow in that process, but we give everybody an opportunity to participate and judge the record that we assemble.

And that this paperwork reduction act process gives everyone another chance to present the information in a different light. And that is sort of circumventing the rulemaking process that was set up in the act.

Senator **Metzenbaum**. Dr. Harwood?

Dr. **Harwood**. Yes, I agree with that.

Senator **Metzenbaum**. Mr. Martonik, how would you respond to the same questions with respect to the thrust of OMB's actions?

Mr. **Martonik**. I would agree with Dr. Harwood and Ms. Silk. I would also like to point out that there is a different type of analysis that is done by the OSHA staff in comparison to that done by the OMB staff.

OSHA staff will look for studies, to use those studies to justify its action. OMB tends to look at a statement, a bald statement, such as, we disagree with OSHA's standard as a reason for not approving it.

So in other words, OSHA would do a substantive review of studies and information, OMB would use a more general disagreement with an OSHA approach.

I would also like to point out that OSHA is also concerned about costs. OSHA only promulgates standards that are feasible.

OMB's review of costs are somewhat different than OSHA's, and OMB has a different interpretation of what is correct and what isn't correct.

I am not certain what the guidelines OMB uses to make their determinations.

Senator METZENBAUM. Mr. Martonik, have there been any discussions at a higher level between OMB and OSHA, or with any other persons in the administrative hierarchy, to discuss this whole question of OMB frustrating the efforts of OSHA officials?

Mr. MARTONIK. To my knowledge there have been communications between higher level officials at OMB and Labor Department and OSHA since 1981 to try to reach agreements on issues.

And sometimes there have been agreements, and other times, there haven't been.

Senator METZENBAUM. Have there been any others in the Administration who have participated in these differences of opinion between OMB and OSHA, such as the domestic policy conference at the White House? Has there been any involvement at that level?

Mr. MARTONIK. To my knowledge there were on occasions meetings with the Vice President or his staff on certain issues, particularly regarding hazard communication.

Senator METZENBAUM. Particularly regarding what?

Mr. MARTONIK. The hazard communication standard that Ms. Silk testified about, and in addition, there were some discussions about an AIDS policy that occurred with the domestic policy council.

Senator METZENBAUM. And did the President himself participate in some of these meetings?

Mr. MARTONIK. I don't know.

Senator METZENBAUM. And did I understand you to say that some of the Vice President's staff was involved in some of these discussions?

Mr. MARTONIK. Yes, they were involved in the hazard communication standard, and the noise standard, specifically.

Senator METZENBAUM. Were you present at those meetings?

Mr. MARTONIK. I was present at several meetings, yes.

Senator METZENBAUM. And can you tell us what transpired at those meetings, and what was the position of the Vice President's staff, the OMB and OSHA?

Mr. MARTONIK. At the time we in OSHA were considering some revisions to a standard that required employers to provide a hearing conservation program to workers.

We in OSHA were cutting back this standard. The OMB staff wished to cut the standard back further, and had some recommendations for cutting it back further.

The outcome, however, was that OSHA maintained its position, and we did not take the suggestions of the Office of Management and Budget or the Vice President's staff.

Senator **Metzenbaum**. And how did the Vice President's staff happen to get into these discussions?

Mr. **Martonik**. Well, the Vice President had a task force for regulatory relief, and was broadly overseeing the deregulatory programs of the agencies.

I do not know specifically how the individuals got involved with these issues.

Senator **Metzenbaum**. And was the Vice President's staff member coming down more supportive of the OMB position than the OSHA position?

Mr. **Martonik**. Yes.

Senator **Metzenbaum**. And can you tell us the name or names of those persons from the Vice President's staff who were involved in these discussions?

Mr. **Martonik**. The name of the Vice President's staff was Boyden Gray.

Senator **Metzenbaum**. Thank you very much. Thank you, Mr. Chairman.

The **Chairman**. Did you ever detect at any time in any of those meetings that there was any suggestions that the health standards ought to be strengthened rather than weakened?

Mr. **Martonik**. Yes, there was one occasion. There was an occasion with an asbestos standard. There was a suggestion that we consider to propose a lower limit for asbestos.

Other than that, every other circumstance, OMB wished to have a weaker standard that OSHA was proposing.

The **Chairman**. What finally happened to the asbestos standard?

Mr. **Martonik**. The asbestos standard was promulgated as a final standard in 1985. We published a separate standard for construction and a separate standard for general industry.

We were sued on the standard by both the industry and the unions and the public interest groups. A court of appeals has just reached their decision. The court remanded many sections of the asbestos standard back to the agency to make the standard tougher, to make revisions that would be more worker protection.

The **Chairman**. Dr. Infante, you supervised OSHA's efforts to regulate wood dust?

Dr. **Infante**. Yes, that is correct.

The **Chairman**. And how many workers are exposed to wood dust?

Dr. **Infante**. Well we have estimates ranging from 1.1 to 3.3 million. And that is with exposure at any time on their job. And with fulltime workers, there are somewhere between 115,000 and 300,000.

The **Chairman**. And what health effects are associated with occupational exposure to wood dust?

Dr. **Infante**. Well, we know that wood dust causes nasal cancer, perhaps other cancers. It has been associated with a decrease in lung function, and also, is known to cause asthma from some types of woods. And also, it causes dermatitis.

The **Chairman**. And does OSHA currently have any kind of standard for wood dust?

Dr. **Infante**. No, we do not.

The **Chairman**. So wood dust exposure is unregulated?

Dr. **Infante**. That is correct.

The **Chairman**. And was OSHA petitioned in March of '85 by the Carpenters Union and three other unions to develop a health standard for wood dust?

Dr. **Infante**. Yes, that is correct.

The **Chairman**. And it has been more than three years since the agency was petitioned. Has OSHA decided whether to regulate wood dust yet?

Dr. **Infante**. It has not decided.

The **Chairman**. Maybe we should look at some of what has transpired to date.

Over a year after the petition was filed, did you and your staff prepare an options memo for the Assistant Secretary, following a thorough review of the scientific literature on wood dust?

Dr. **Infante**. Yes, we did.

The **Chairman**. I have a copy of that memo, and it states, under the recommendation: "Based on the data submitted by the unions and in support of their petition and other epidemiological and toxicological and exposure data that we have reviewed, we recommend that OSHA initiate Section (6b) rulemaking for occupational exposure to wood dust. We have the staff available to undertake this project."

[Excerpts from the memo referred to follow:]

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of: #2

May 23, 1986

MEMORANDUM FOR JOHN A. PENDERGRASS

FROM: BARRY J. WHITE
ACTING DIRECTOR
HEALTH STANDARDS PROGRAMS

SUBJECT: Option Memorandum Concerning the Response to the Petition for a Standard Regulating Occupational Exposure to Wood Dust

SUMMARY

On March 27, 1985 the United Brotherhood of Carpenters and Joiners of America petitioned OSHA to promulgate a standard for occupational exposure to wood dust under Section 6(b) of the Occupational Safety and Health Act. The Agency has reviewed epidemiologic, toxicologic and exposure data in order to evaluate the petition. Occupational exposure to wood dust in the U.S. has been associated with increased rates of death from nasal and other cancers. Skin and respiratory diseases are also known to be related to wood dust exposure. The purpose of this memorandum is to obtain your decision regarding OSHA's reply to the petition and subsequent action.

LEGAL AUTHORITY

The legal authority for this action is 29 U.S.C. 655 and 657.

BACKGROUND

Human studies have established an association between exposure to wood dust and an excess risk of nasal cancer. In the U.S., employment in the woodworking industry has been associated with at least a fourfold increase in nasal cancer. In England, workers exposed to wood dust have demonstrated an eightfold increase in nasal cancer in general, and a 50-60 fold increase in adenocarcinoma of the nasal cavity, specifically.

Significantly elevated risks of dying from other cancers have been observed among U.S. workers employed in wood shops (pattern makers in the auto industry and carpenters) and among forestry and logging workers. Respiratory system sensitization and deficits in lung function, indicative of increased risk of chronic lung disease, have been measured in workers exposed to cumulative wood dust concentrations of 27 mg/m^{3}yrs. This is equivalent to an exposure of 0.6 mg/m^3

for a 45-year working lifetime. Respiratory system sensitization has been demonstrated to be irreversible in some workers exposed to red cedar evaluated 1.5 years after removal from exposures.

OSHA does not have a standard for occupational exposure to wood dust, and the nuisance dust standard has been applied unsucessfully to wood dust exposures. The nuisance dust standard specifies a permissible exposure limit (PEL) of 5 mg/m^3 for respirable dust and 15 mg/m^3 for total dust. Administrative law judges have held that the nuisance dust standard cannot apply to organic dusts such as wood dust (and grain dust). Based on the recent decision by the OSHA Review Commission on grain dust (Bunge Corporation vs. Secretary of Labor), the Office of the Solicitor is of the opinion that the nuisance dust standard probably cannot be applied to wood dust exposures.

The American Conference of Governmental Industrial Hygienists (ACGIH) recommends a threshold limit value (TLV) of 1 mg/m^3 for hard wood and 5 mg/m^3 for soft wood. The recommended short term exposure limit (STEL) is 10 mg/m^3 for soft wood (See attached ACGIH documentation.). Other countries have already established TLVs regulating exposures to wood dust: England, Finland, and Italy (5 mg/m^3), Sweden (4 mg/m^3); British Columbia (5 mg/m^3 non-allergenic, 2.5 mg/m^3 allergenic).

NIOSH estimated that the wood products industry employs 700,000 workers who are exposed to wood dust. Some of these individuals are employed in timber operations such as forestry, logging and sawmills. Some are employed in paper and plywood manufacturing, carpentry, and joinery. Others are employed in furniture, cabinet and model (pattern) making. While complete data on existing wood dust exposures for these workers are not available, high concentrations of wood dust have recently been observed in some operations. Data have been evaluated for 16 health hazard evaluations conducted by NIOSH and three surveys conducted by industry. Two-thirds of these surveys had at least one wood dust measurement well in excess of 15 mg/m^3. Since most of these surveys were based on hazard evaluations, the exposure levels are probably biased toward higher concentrations than those that would be found based on a random sampling of all wood products industries. Nevertheless, such data indicate that workers in many operations are exposed to levels of dust well above the ACGIH recommendations of 1-5 mg/m^3, and also above those allowed in Canada and several European countries.

In March 1985, OSHA was petitioned by the United Brotherhood of Carpenters and Joiners of America (UBCJA) to "regulate wood dust as a toxic substance" with a PEL of 1 mg/m^3. In this petition, the UBCJA stated that "...thousands of [their] members are exposed to wood dust" which is "well known [to cause] dermatitis and ...asthma. [and may]...cause nasal cancer...and pulmonary impairment." (See attachment.) The UBCJA petition was supported by the United Paperworkers International Union, the United Furniture Workers of America, and the International Woodworkers of America. These unions submitted approximately 50 research studies in support of their claims of adverse health effects.

Issues/Options Considered

The following options have been considered.

1. Initiate rulemaking under Section 6(b). Workers exposed to wood dust are at risk of developing a number of serious diseases. A 6(b) standard will ensure a reduction in the exposure levels and consequently in disease prevalence. Other provisions such as exposure monitoring, medical surveillance, protective clothing and hazard communication would reduce and, in some cases, reverse some of the diseases related to wood dust exposure.

2. Amend Table Z-3 in 29 CFR 1910.1000. The nuisance dust table provides a PEL of 5 mg/m^3 for respirable dust and 15 mg/m^3 for total dust. Although OSHA has attempted to apply the nuisance dust PEL for all dusts including wood dust, citations issued over the past several years for wood dust (and grain dust) exposures have not been upheld by the OSHA Review Commission. The judges have concluded that the nuisance dust standard does not apply to organic dusts. The nuisance dust standard could be amended to make it clear that it applies to all dust, including wood dust. However, the existing PEL would still be too high for wood dust since deficits in pulmonary function have been observed in workers exposed to wood dust concentrations well below the nuisance dust PEL, at levels comparable to the ACGIH TLV for hard wood. Moreover, an attempt by OSHA to amend Table Z-3 in CFR 1910.1000 would most likely be followed by a request for an informal fact-finding hearing and eventually result in the same effort required to develop a standard.

3. Take No Action. The Agency could continue its policy of citing wood dust exposures that are above the nuisance dust PEL. However, the Agency has had difficulty in enforcing this PEL for dusts that are not mineral dusts. In addition, wood dust exposure is strongly associated with nasal cancer and acute adverse health effects have been observed at dust levels well below the nuisance dust PEL. For these reasons, this option is not recommended.

Recommendation. Based on the data submitted by the unions in support of their petition and other epidemiologic, toxicologic, and exposure data that we have reviewed, we recommend that OSHA initiate Section 6(b) rulemaking for occupational exposure to wood dust. We have the staff available to undertake this project.

ANCILLARY REQUIREMENTS

a. A Regulatory Impact Analysis will be prepared if the Agency decides to initiate Section 6(b) rulemaking.
b. A Regulatory Flexibility Analysis will be prepared if the Agency decides to initiate Section 6(b) rulemaking.
a. A Paperwork Reduction Act Clearance request will be prepared if the Agency decides to initiate Section 6(b) rulemaking.

TIMETABLE

The petition for a standard was sent to the Agency in March, 1985. Subsequently, numerous inquiries have been received regarding the status of OSHA's response to the petition. Because of staff turnover and other agency priorities, an evaluation has just been completed. We recommend that a formal response to the petition be completed by July 1, 1986, in order to inform the unions of your decision.

☐ I agree, initiate rulemaking.

☐ Let's talk about this in more detail.

The CHAIRMAN. So that would indicate you were prepared to move ahead; is that correct?

Dr. INFANTE. That is correct.

The CHAIRMAN. Did Mr. Pendergrass accept your recommendation and decide to regulate wood dust?

Dr. INFANTE. No, there has been no decision yet.

The CHAIRMAN. Did he decide instead the agency needed to collect more information about wood dust before it could respond to the petition?

Dr. INFANTE. Well, after we had transmitted that memo, then there were further efforts within the agency to gather more information on wood dust exposure levels. And also, NIOSH was doing a further evaluation of wood dust, and we had also stated that we were waiting to see what the results were from the update of the NIOSH evaluation.

The CHAIRMAN. Well, did you think there was enough information of the toxic effects of wood dust to begin regulating?

Dr. INFANTE. Yes.

The CHAIRMAN. And as a result of the Assistant Secretary's decision, did the agency spend the next year collecting more information on wood dust? And did you and your staff analyze that data?

Dr. INFANTE. Yes, we did.

The CHAIRMAN. And did you and your staff then prepare a second option on wood dust in December of 1987, which basically reiterated what was said in the first options memo prepared a year and a half earlier?

Dr. INFANTE. That is correct, yes.

The CHAIRMAN. And the recommendation—and this is a year and a half later: "Based on the data submitted by the unions in support of their petition, and other epidemiological and toxicological and exposure data that we've reviewed, we recommend that OSHA initiate a Section 6(b) rulemaking. We have the staff available to undertake this project."

[The memo referred to follows:]

DEC 3 1987

MEMORANDUM FOR: JOHN A. PENDERGRASS
ASSISTANT SECRETARY

Changed

FROM: CHARLES E. ADKINS
Director
Health Standards Programs

SUBJECT: Options Memorandum Concerning the Response to the Petition for a Standard Regulating Occupational Exposure to Wood Dust

SUMMARY

On March 27, 1985 the United Brotherhood of Carpenters and Joiners of America (UBCJA) petitioned the Occupational Safety and Health Administration (OSHA) to regulate wood dust as a toxic substance with a permissible exposure limit (PEL) of 1 mg/m^3 total wood dust. A review of data related to the petition follows.

Excess death from nasal cancer, a rare cancer in the general U.S. population, has been reported among U.S. furniture workers and other woodworkers. Wood dust has also been associated with stomach, lung, and hematopoietic cancers, but these have not been confirmed. Allergic skin reactions and respiratory system sensitization from wood dust is well documented. Asthma from red cedar and, to a lesser extent, from softwoods has been observed among U.S. woodworkers at levels below the American Conference of Governmental Industrial Hygienists (ACGIH) guidelines of 5 mg/m^3 for softwoods. Asthma from exposures to oak has been confirmed. Asthma from red cedar has been demonstrated to be irreversible after one and one-half years of removal from exposures for some workers.

Studies for estimating quantitative risk of cancer are of limited value. Dose-response data on non-malignant respiratory effects are available, however a quantitative risk assessment has not been performed for this analysis.

The U.S. woodworking population is quite large, between 1-3 million workers. Some of these workers are employed in timber operations such as forestry, logging, and sawmills. Others are employed in furniture and model making. Although the Hazard Communication Standard (HCS) includes wood dust as a health hazard there is currently no permissible exposure limit (PEL) for regulating wood dust exposures in the U.S.

Exposure limits recommended by the American Conference of Governmental Industrial Hygienists (ACGIH) are 5 mg/m^3 for softwood dust and 1 mg/m^3 for hardwood dust. Exposure limits between 1 to 5 mg/m^3 have been established in twelve countries.

OSHA believes that a standard for wood dust exposures is necessary to prevent occupationally-related nasal cancers and perhaps other forms of cancer, as well asthma, dermatitis, rhinitis (inflammation of the nasal mucosa), and decrements in lung function.

LEGAL AUTHORITY

The legal authority for this action is 29 U.S.C. 655 and 657.

BACKGROUND

Prior to the 1960's, wood dust had been considered to have little toxic effect. The ACGIH limits of 1966 for inert dusts included wood dust. The ACGIH stated at that time that the limit of 15 mg/m^3 for nuisance dusts was set despite the "....lack of knowledge as to the ultimate effects of inhaling very high concentrations of such dusts, upon the development of diseases of the lungs..."

In 1971, the ACGIH recommended reducing exposures to non-allergenic woods to 5 mg/m^3 and in 1981 recommended lowering exposures to hardwoods to 1 mg/m^3, due to the excess nasal cancers associated with work in the furniture industry where mainly hardwood was thought to be used. The ACGIH recommended an exposure level of 5 mg/m^3 for softwoods since risk of nasal cancer was apparently lower in the building industry. The ACGIH stated that this lower risk may reflect the use of softwood in the building industry, or result from dust concentrations not being high enough or of the right particle size to cause nasal cancer.

Until recently, OSHA regulated wood dust as a nuisance dust. In April 1986, in two OSHA citations for grain dust exposures, the Occupational Safety and Health Review Commission held that the nuisance dust standard did not apply to organic dusts. In a third case, the Administrative Law Judge held that wood dust was not an inert nuisance dust and therefore not subject to the nuisance dust standard. Thus, OSHA currently has no standard for wood dust exposures other than the Hazard Communication Standard.

TOXIC HAZARDS

Risk Assessment

In OSHA standard setting, the level proposed for a PEL should idealistically be based upon a quantitative risk assessment, or dose-response data, if possible. There are relatively few animal data which relate to dose-response regarding the toxicity of wood dust. Exposure data from retrospective cancer epidemiological studies are also limited for use in risk assessments, and do not provide data of similar quality to that used by OSHA in the past for quantitative risk assessments for other hazards. A small study by Kauppinen, 1986, demonstrates an Odds Ratio of 1.6, after adjusting for smoking, for the development of respiratory cancer among woodworkers who have average wood dust exposures of 1-2 mg/m^3 and mean duration of exposures of 10 years. An Odds Ratio of 1.6 represents a 60% increase in respiratory cancer.

Nasal Cancer

In the United States, three studies have reported a 4-fold increased risk of either nasal cancers or adenocarcinomas in furniture workers, and a fourth study has reported a similar relationship between nasal cancer and wood dust exposure. A fifth study failed to show an increased risk of nasal cancer among furniture workers but did indicate such an increase in logging and timber industries (NIOSH, 1987). Excess nasal cancers have been observed among woodworkers exposed to either hard or soft woods (Hernberg, 1983).

Nasal cancers occur in the middle of the face, at the base of the brain, and are operable, in many cases, although the surgery may result in disfigurement and prosthetic replacement. Deaths from nasal cancer occur rarely in the general U.S. population (3 per million, white males). Nasal cancer deaths result in an underestimate of the risk of nasal cancer because of survival through surgical intervention. Due to the large number of workers exposed to wood dust (between 1 to 3 million), the cumulative effect of exposure on this large population warrants consideration.

Non-Carcinogenic Effects

Studies of the non-carcinogenic effects of wood dust provide some dose-response data. These studies indicate loss of lung function as a result of exposure to cumulative doses of wood dust that would average less than 1 mg/m^3 over a working lifetime (Whitehead, 1981). Occupational asthma has been observed [illegible] western red cedar workers exposed to wood dust levels of 1-3 mg/m^3 (Edwards, NIOSH, 1978), and mucostasis, or prolonged retention of wood dust in the nasal cavity, has been observed at levels of 2 mg/m^3 (Andersen, 1977). Significant and non-significant increases in nasal dryness, bleeding, irritation, coughing, and wheezing have been observed in wood workers at dust concentrations averaging less than 4 mg/m^3 (NIOSH,1987).

There are little data to differentiate, in general, between adverse health effects caused by hard and softwood. Softwood comes from cone bearing species; hardwood comes from broad-leafed deciduous species. Significant loss of lung function has been observed among workers exposed to both hard (maple) and soft (pine) wood dust (Whitehead, 1981).

Dermatitis associated with wood dust exposures results in the loss of a large number of work days according to the Bureau of Labor Statistics (BLS). In addition, the number of cases of dust diseases of the lungs and skin diseases, reported to BLS, is above the national average for wood workers in different types of industries.

EXPOSURE CHARACTERIZATION

In response to the UBCJA petition, OSHA reviewed the existing data and collected additional information on the number of workers exposed to wood dust, by level of exposure. The Division of Regulatory Analysis completed data collection from nine site visits and began collection of information on technological feasibility of dust control. The Health Response Team completed wood dust exposure data collection from ten site visits of wood-working establishments. NIOSH conducted an extensive review of the scientific literature and submitted the results to OSHA in August 1987.

While complete data on existing wood dust exposures for U.S. workers are not available, high concentrations of wood dust have recently been observed in some operations. OSHA and state compliance data from 1979-86 indicate that about one of every three inspections had at least one total wood dust sample greater than the levels that were allowed by the nuisance dust standard (15 mg/m^3). High exposures occurred in all types of wood industries. The geometric mean wood dust levels for federal inspections following worker complaints was 3.7 mg/m^3 softwood and 1.9 mg/m^3 hardwood. As late as February, 1986, OSHA compliance inspections recorded hardwood dust levels over 30 mg/m^3. In thirteen Health Hazard Evaluations (HHE's) conducted by the National Institute for Occupational Safety and Health

(NIOSH) between 1974-82, seven of the workplaces had dust levels above 15 mg/m^3. These data were initially thought to be biased towards concentrations higher than those that would be found based on a random sampling of all wood products industries.

However, more recent evaluation indicates high dust levels. A survey by OSHA's Health Response Team was conducted in 1986, in response to the UBCJA petition, to evaluate these exposure data and to determine the best sampling methodology for use in standard setting. The results showed that two out of the ten workplaces surveyed had dust levels that exceeded the nuisance dust level of 15 mg/m^3. One of these workplaces was a furniture manufacturer, and the other was a red cedar workplace. Four workplaces had dust levels above 5 mg/m^3, and all ten were above 1 mg/m^3. This survey may also represent a biased sample because the survey included workplaces of companies that volunteered to participate in non-compliance inspections for the purpose of information gathering. Such data indicate that workers in many types of operations are exposed to wood dust levels above the ACGIH recommendations of 1-5 mg/m^3.

Recommended Standard

1. Toxic Substance Standard

It is recommended that the Occupational Safety and Health Administration begin promulgation of a toxic substance standard for wood dust.

The UBCJA petition (3/27/85) requested a permissible exposure limit (PEL) of 1 mg/m^3 total dust. Representatives from industry, who met with the Health Response Team, have stated that reduction of dust levels to 5 mg/m^3 is feasible, under present workplace conditions. Dr. Harold Imbus, who has represented the American Furniture Manufacturers Association in the past, recommends 5 mg/m^3 (Wood Dust Docket H-012, Ex. No. 6-009). Between 40,000 - 100,000 full-time woodworkers are currently exposed to total wood dust levels of 5 mg/m^3 or greater.

Although there has been some discussion about the particular constituents of wood dust that result in toxicity, there is good evidence that wood dust itself is biologically active. It is capable of causing allergic sensitization, "occupational asthma," and stagnation of body clearance mechanisms due to its chemical and physical properties. These effects are observed at exposures less than 5 mg/m^3 total wood dust. Any materials attached to the dust such as pesticides or preservatives, are carried with the dust and deposited and retained in the body. There they may leach slowly into the body along with chemicals from the wood itself. Health effects from wood dust containing pesticides are much more severe than wood dust alone, (Kauppinen, 1986). These effects occur as a result of very low wood dust exposure levels.

In addition to the PEL, a wood dust standard should include other appropriate ancillary provisions such as exposure monitoring, medical surveillance, and protective clothing due to the seriousness of occupational asthma and other diseases related to wood dust exposures.

2. Methods of Measuring Dust Concentrations

A major concern among representatives from industry who met with OSHA staff during data collection was that wood dust is very different from industry to industry and that total wood dust samples do not adequately reflect the dose of wood dust that is entering the workers' bodies. In response to this, OSHA's Health Response Team (HRT) conducted a survey of wood-working establishments to determine the best method for measuring dust levels for use in standard setting. Evaluation of sampling methodology was based on whether or not the method was: (1) used by OSHA and industry, (2) used by researchers for quantifying doses of dust associated with adverse health effects, (3) reproducible, and (4) easy to use in the field.

The HRT found that in the absence of proven inspirable particulate mass sampler, total dust samples using open or closed face cassettes should be adequate for setting a PEL. Total dust samples underestimate the total dust that is capable of entering the nose because they most accurately sample airborne wood dust which is 30 microns, aerodynamic diameter. In this size range, all the respirable and tracheobronchial dust (able to penetrate past the larynx) and half the extrathoracic dust that can enter the nose is sampled. Together, these three categories of dust cover the range of sizes of particles that are inspirable.

A manual on standard methods for clean-up and control of wood dust exposures is being drafted by HRT. Well-known control technology is readily available. A standard procedure for total dust sampling and analysis has been drafted by HRT. A standard for regulating wood dust exposures should include a preference for engineering controls, where feasible, for production activities but permit respirators in certain operations.

Options Considered

The following options have been considered.

1. Initiate rulemaking under Section 6 (b).

Workers exposed to wood dust are at risk of developing a number of serious diseases. A 6 (b) standard will ensure a reduction in the exposure levels and consequently in disease. Other provisions of a standard such as exposure monitoring, medical surveillance, protective clothing and hazard communication would further reduce the diseases related to wood dust exposure.

2. Include wood dust in PEL update project.

Regulation of wood dust may be possible by including the ACGIH recommended threshold limit values (TLVs) in the proposed PEL update. These levels may be acceptable to several of the trade associations, however adverse health effects have been documented below the ACGIH TLVs for softwood. In addition, ancillary provisions of an OSHA toxic substance standard are necessary to prevent the types of illness caused by wood dust. These would not be included in the PEL update project.

An attempt by OSHA to amend the tables in CFR 1910.1000 without performing a special health hazard assessment would most likely be followed by a request for an informal fact-finding hearing and eventually result in the same effort required to develop a standard. Therefore, in order not to postpone regulation unnecessarily, the joint initiation of 6 (b) rule-making and adoption of ACGIH levels in the PEL update, under this option, could also be considered.

3. Initiate rulemaking as an industry-specific standard

Injury and illness rates in some wood industries are the highest in the country. The major reported causes of disability among woodworkers include injury, accidental death, amputation, loss of hearing, skin diseases, and dust diseases of the lung. Wood dust is generated during the cutting or working of a piece of wood, or wood product, through the use of machines. Machinists, among woodworkers, experience relatively higher wood dust exposures than other workers. Since local exhaust through engineering controls is recommended for reducing wood dust exposures (NIOSH, 1987), design of such controls should overlap design for safety (29 CFR 1910.213, Wood working Machinery Requirements) and noise control (29 CFR 1910.266 c. vi). Involvement of safety staff in the development of the standard is recommended to ensure that the requirements of the standard be sensitive to both the safety concerns (amputations, accidental deaths) and health concerns (loss of hearing, loss of lung function) of controls for wood cutting machinery, without one superseding the other. Consideration must be given to all other relevant standards, such as those for safety helmets, fire protection, and face protection, to ensure that engineering design of control technology and protective equipment required under a wood dust standard would not interfere with the intended function of such equipment under existing standards. This type of standard has the advantage of comprehensiveness; however considerably more resources will be needed to make this approach work, and OSHA has little experience in this type of rulemaking.

Recommendation

Based on the data submitted by the unions in support of their petition and other epidemiologic, toxicologic, and exposure data that we have reviewed, we recommend that OSHA initiate Section 6 (b) rulemaking for occupational exposure to wood dust alone. The other two options are also viable. We have the staff available to undertake this project.

Ancillary Requirements

a. A Regulatory Impact Analysis will be prepared if the agency decides to initiate section 6 (b) rulemaking.

b. A Regulatory Flexibility Analysis will be prepared if the agency decides to initiate section 6 (b) rulemaking.

c. A Paperwork Reduction Act Clearance request will be prepared if the agency decides to initiate section 6 (b) rulemaking.

Timetable

We recommend that a formal response to the petition be completed by December, 1987.

In recent correspondence with the UBCJA, OSHA stated that the union would be informed, following the Policy Review Board's December meeting, of the Agency's decision whether or not to regulate wood dust exposures.

REFERENCES

1. ACGIH, Particle Size Selective Sampling in the Workplace, 1985.

2. ACGIH, Documentation of TLVs, 4th Edition, 1980.

3. Acheson ED, Pippard EC, and Winter PD (1984). "Mortality of English furniture makers." Scand J Work Envir and Health 10:211-217.

4. Acheson, ED, Cowdell RH, and Rang EH (1981). "Nasal cancer in England and Wales: an Occupational survey." Br J Ind Med 38:218-224.

5. Acheson ED (1976). "Nasal cancer in the furniture and boot and shoe manufacturing industries." Preventive Med 5:295-315.

6. Anderson HD, Andersen I, and Solgaard J (1977). "Nasal cancers, symptoms and upper airway function in woodworkers." Br J Ind Med 34:201-207.

7. Ashley, F., et al. "Pulmonary Function: Relation to Aging, Cigarette Habit, and Mortality, The Framingham Study" Annals of Internal Medicine Vol 82, 1975.

8. Battista G, et al. (1983). "A case-referent study on nasal cancer and exposure to wood dust in the province of Siena, Italy." Scand J Work Envir and Health 9:25-29.

9. Brinton, L.A., et al. (1984) "A case-control study of cancers of the nasal cavity and paranasal sinuses." Am J Epid 119:896-906.

10. Brinton, L.A., et al. (1977). "A death certificate analysis of nasal cancer among furniture workers in North Carolina." Cancer Res 37:3473-3474.

11. Brinton LA, et al (1976). "Nasal cancer in U.S. furniture industry counties." The LANCET September 18, 1976, p. 628.

12. Bureau of Labor Statistics, U.S.D.O.L., "Occupational Injuries and Illnesses in the United States by Industry, 1984", Bulletin 2259, May 1986.

13. **Cecchi F, et al** (1980). "Adenocarcinoma of the nose and paranasal sinuses in shoemakers and woodworkers in the province of Florence, Italy (1963-77)." Br J Ind Med, 37:222-225.

14. Chan-Yeung M (1977). "Fate of occupational asthma." Am Rev Respir Disease 116:1023-1029.

15. Chan-Yeung M, et al (1978). "A respiratory survey of cedar mill workers." J Occup Med 20:323-332.

16. EPA, U.S. Cancer Mortality, Rates and Trends, USEPA, NCI, 1983.

17. Esping, B., and Axelson, O. (1980). "A pilot study on respiratory and digestive tract cancer among woodworkers." Scand J Work Envir and Health 6:201-205.

18. Gerhardsson, M., et al, "Respiratory Cancers in Furniture Workers," B.J.I.M. 1985, 42: 403-405.

19. Hayes, R.B., "Wood-Related Occupations, Wood Dust Exposure, and Sinonasal Cancers," Am. J. Epid. Vol. [illegible], No.4, 1986.

20. Harrington, [illegible], et al, "Lung Cancer in Coastal Georgia," J. Natl Cancer Inst., Vol. 60, [illegible], 1978.

21. Hernberg S, et al (1983a). "Nasal cancer and occupational exposures: preliminary report of a joint Nordic case-referent study." Scand J Work Envir and Health 9:208-213.

22. Hernberg S, et al (1983b). "Nasal and sinonasal cancer: connection with occupational exposures in Denmark, Finland and Sweden." Scand J Work Envir and Health 9:315-326.

23. **Holness DL, et al** (1985). "Respiratory function and **exposure-effect** relationships in wood dust-exposed and control **workers.**" J Occup Med 27:501-506.

24. IARC (1981). Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans: Wood, Leather and Some Associated Industries. IARC Vol. 25, IARC, Lyon, France.

25. Imbus, H.R., and Dyson, W.L., "A Review of Nasal Cancer in Furniture Manufacturing and Woodworking in North Carolina, the United States, and Other Countries." J. Occup. Med. Vol. 29 No 9 Sept. 1987.

26. Imbus, HR., and Dyson, WL., (1985). "Occupational exposure to wood dust considerations for refinement of the threshold limit value." Health and Hygiene, Inc., Greensboro, N.C., January 4, 1985.

27. I.S.O. (Intl. Stds. Organ.) "Size definitions for particle sampling" Am Ind Hyg Assoc J Vol. 42, 1981.

28. Kauppinen, T.P., et al, "Respiratory cancers and chemical exposures in the wood industry: a nested case -control study." British Journal of Industrial Medicine, 1986; 43:84-90.

29. Meyer, M., et al., "The Role of the lung in stomach carcinogenisis." Am. Rev Resp. Dis, Vol 121, 1980.

30. Milham S, Jr. (1978). "Mortality experience of the AFL-CIO United Brotherhood of Carpenters and Joiners of America 1969-1970 and 1972-1973." DHEW (NIOSH) No. 78-152, Cincinnati OH, January 1978.

31. N.C.I. Atlas of U.S. Cancer Mortality Among Whites: 1950-1980, Nat. Cancer Institute, Bethesda, Md. 1987.

32. NIOSH, Health Effects of Exposures to Wood Dust: A Summary of the Literature. NIOSH, Cincinnati: OH. 1987.

33. NIOSH, Draft Criteria Document for Wood Dust, 1979.

34. NIOSH (1978). Health Hazard Evaluation Report 76-79, 80-543, Weyerhaeuser Co., Longview WA. DHHS, National Institute for Occupational Safety and Health, Cincinnati, OH, November 1978.

35. Olsen JH, et al (1984). "Occupational formaldehyde exposure and increased nasal cancer risk in man." Int J Cancer 34:639-644.

36. Olsen J and Sabroe S (1977). "A follow-up study of non-retired and retired members of the Danish carpenter/cabinet makers' trade union." Int J Epid 8:375-382.

37. OSHA/HRT, Survey of Woodworking Establishmets, 1987. (DRAFT)

38. OSHA/ORA,SAIC, Economic Profiles and a Preliminary Analysis of Occupational Exposure to Wood Dust, Draft, 1987.

39. Rang. E.H. "Cancer in Furniture Workers," Int. J. Epi, Vol. 10 #3, 1981.

40. **Robinson, C.F.** et al, "Plywood Mill Workers' Mortality 1945-1977", December 1, 1985, NIOSH.

41. Robinson C, Waxweiler RJ, and McCammon CS (1980). "Pattern and model makers, proportionate mortality 1972-1978." Am J Ind Med 1:159-165.

42. Robinson, Cynthia F., Waxweiler, Richard J., and Fowler, Douglas P., "Mortality Among Production Workers in Pulp and Paper Mills", NIOSH, 1982 Draft.

43. Roscoe, Robert J., Schober, Susan E. et al., "Mortality Among Automotive Wood Model Makers," NIOSH, 1980.

44. Roush, G.C. "Sinonasal Cancer and Occupation," Am. J. Epi, Vol.111, No.2, 1980.

45. Siemiatycki, J., et al., "Associations Between Several Sites of Cancer and Nine Organic Dusts," (in press), Am. J. Epi, , 1985.

46. Stellman, SD, and Garfinkel, L., (1984). "Cancer mortality among woodworkers." Am J Ind Med 5:343-357.

47. Stuart, B.O., "Particle size selective sampling," Appl. Ind Hyg, Vol 1, #2, 1986.

48. Swanson, G.M. "Colon Cancer Incidence Among Model Makers," J. Occup. Med., Vol 27, #8, 1985.

49. Tollerud DJ, et al (1985), "Mortality from multiple myeloma among North Carolina furniture workers." JNCI 74:799-801.

50. Viren J, Vogt TM, and Dixon [illegible] (1982). "Case control study of nasal cancer and occupational exposure to wood dust." [illegible] Associates, Inc., 11 Executive Boulevard, Suite 710, Rockville, MD [illegible]

51. **Wang, C.L., "Occupational skin disease continues to plague industry." Monthly Labor Review,** Feb. 1979.

52. **Whitehead LW** (1982). "Health effects of wood dust—relevance for an occupational standard." Am Ind Hyg Assoc J 43:674-678.

53. Whitehead LW, Ashikaga T, and Vacek P (1981). "Pulmonary function status of workers exposed to hardwood or pine dust." Am Ind Hyg Assoc J 42:178-186.

54. **Whitehead LW, Freund T,** and Hahn LL (1981). "Suspended dust **concentrations** and size distributions, and qualitative analysis of inorganic particles, from woodworking operations." *Am Ind Hyg Assoc J* 42:461-467.

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The **Chairman**. That is exactly the same; is that correct?

Dr. **Infante**. Yes, that is correct. I mean, we do not have any standard currently to protect workers from wood dust, and we felt some——

The **Chairman**. But after a year and a half, the recommendation is identical to what it was a year and a half earlier; is that correct?

Dr. **Infante**. That is correct.

The **Chairman**. And was the memo forwarded to the Policy Review Board so a decision could be made on OSHA's response to the union's position for a standard that was now over two years old?

Dr. **Infante**. Yes, it was.

The **Chairman**. And did the Policy Review Board accept OSHA's recommendation?

Dr. **Infante**. No, it did not.

The **Chairman**. Is it now three months since OSHA recommended regulating wood dust to the policy review board? And have you had any further instructions to regulate wood dust?

Dr. **Infante**. Not to my knowledge, no.

The **Chairman**. So OSHA wants to develop a health standard, and the Policy Review Board apparently does not?

In your opinion as a scientist, do you think that there was sufficient information on the hazards of wood dust in 1985 to begin developing a standard?

Dr. **Infante**. Yes, if that was—if the agency wanted to develop a standard, there certainly was sufficient evidence.

The **Chairman**. So three years have passed without any response on this particular issue; is that correct?

Dr. **Infante**. Yes, that is correct.

Senator **Metzenbaum**. Dr. Infante, is wood dust covered by the hazard communication standard?

Dr. **Infante**. I am not quite clear. You might address that question to Ms. Silk?

Ms. **Silk**. Yes, it is.

Senator **Metzenbaum**. It is. Dr. Infante, twice you have come up to bat now to try to move forward with the wood dust standard. Where does the buck stop as to who has precluded you from moving forward?

Was it the domestic policy conference? Or was it the head of OSHA? Where did you get the turnoff?

Dr. **Infante**. Well, I am not sure. At some level above health standards in the agency.

I had thought, but I do not know from any direct conversation, that Mr. Pendergrass was in favor of developing a standard for wood dust.

So I would presume, though I do not know specifically, that it was probably at a level above him in the agency that stopped the activity.

Senator **Metzenbaum**. What involvement did the domestic policy——

The **Chairman**. Would the Senator yield? You are talking about the Department of Labor now?

Dr. **Infante**. That is correct, yes.

Senator **Metzenbaum**. And what involvement did the domestic policy conference have in reaching that conclusion, if you know?

Dr. **Infante**. No, I do not know what happens at that level.

Senator **Metzenbaum**. You mentioned something about the domestic policy conference, or I thought you did? You did not?

Dr. **Infante**. No, I did not.

Senator **Metzenbaum**. So you do not know whether or at what level the turn down came, whether it was at the Department of Labor level, or whether it was at the domestic policy conference level?

Dr. **Infante**. That is correct; I do not know.

Senator **Metzenbaum**. Tell me, as a public official, what is the sense of frustration that you have when twice you come up to bat. You know that something should be done, as a scientist. And you find your superiors turning off the spigot and saying, it's no go.

How does one feel under those circumstances?

Dr. **Infante**. Well, I mean it is frustrating, from the standpoint that when you spend an inordinate length of time evaluating data, you draw a conclusion, and then nothing is done with that conclusion; it's not paid any attention to. Of course it is frustrating.

And I guess you feel that perhaps then you would move on to something else where there can be some regulation coming out of the pipeline, rather than continuing to evaluate and reevaluate data.

Senator **Metzenbaum**. In your own mind, and as you discussed the matter with your associates, what conclusions did you arrive at as to why the standard was turned down each time?

Was it employer pressure on the department?

Dr. **Infante**. I really do not have a sense of why we have not decided to regulate wood dust.

Senator **Metzenbaum**. Did anyone give you any logical explanation as to why you should not proceed forward?

Dr. **Infante**. No.

Senator **Metzenbaum**. Thank you very much, Mr. Chairman.

The **Chairman**. Okay, we will go to Dr. Rodgers.

What is your position?

Dr. **Rodgers**. I am a health scientist in the Office of Risk Assessment, Health Standards Programs.

The **Chairman**. Bring that mike just a little closer, if you would, please. We will now talk about the development of the formaldehyde standard.

How long have you been working on health standards?

Dr. **Rodgers**. I have worked in my present position at OSHA for the last eight years. For four and one-half years before that, I worked in a similar position in our sister agency, NIOSH.

The **Chairman**. So you worked in health standards for OSHA and prior to that, for NIOSH. You are the project officer for the formaldehyde standard; is that correct?

Dr. **Rodgers**. I have been involved since mid-1984.

The **Chairman**. Dr. Infante, you have also been involved in the development of the formaldehyde standard; is that correct?

Dr. **Infante**. Yes, that is correct.

The **Chairman**. And Mr. Martonik, were you also closely involved?

Mr. Martonik. Yes, I was.

The Chairman. Dr. Rodgers, was a final standard for formaldehyde published in November of 1987?

Dr. Rodgers. It was signed in November; it was published December 4th.

The Chairman. Is that six years after the agency was first petitioned in 1981 by the United Auto Workers and 13 other unions for an emergency temporary standard based on evidence that formaldehyde may cause cancer in humans?

Dr. Rodgers. Yes.

The Chairman. Dr. Rodgers, did the court repeatedly intervene in the rulemaking process during that six years?

Dr. Rodgers. Yes.

The Chairman. And did OSHA publish an Advance Notice of Proposed Rulemaking in response to a court order?

Dr. Rodgers. Actually, the court didn't appreciate our responding by an Advance Notice, which is less than a guarantee of rulemaking. We had to guarantee the court that the Advance Notice would not stall a proposal later on.

The Chairman. So did OSHA publish a final standard in response to a court order?

Dr. Rodgers. Yes.

The Chairman. Okay. And did the formaldehyde standard which was published in November 1987 under the court order depart significantly from an earlier version of the standard which you had completed on September 15th of 1987?

Dr. Rodgers. Yes.

The Chairman. And did the September 15th version of the standard reflect the opinion of OSHA's health scientists?

Dr. Rodgers. With some minor changes that we made later, yes.

The Chairman. Dr. Infante, do you agree?

Dr. Infante. Yes, I do.

The Chairman. Mr. Martonik, do you agree?

Mr. Martonik. Yes, I agree.

The Chairman. We should look at how and why the final standard that was published departed from that.

Dr. Rodgers, did your draft include a scientific evaluation of the risk of formaldehyde causing cancer in humans?

Dr. Rodgers. Yes, it did.

The Chairman. And did you conclude that the risk was higher than that which had been previously published in the earlier proposal?

Dr. Rodgers. Yes.

The Chairman. And was that conclusion based on new scientific data which showed such a higher risk that was not available at the time of the earlier proposal?

Dr. Rodgers. Yes.

The Chairman. And did you conclude from the data that the cancer risk would still be significant even with the new exposure limit?

Dr. Rodgers. For a one part per million exposure limit for a worker to be exposed over a working lifetime, yes, it would still be significant.

The Chairman. Dr. Infante and Mr. Martonik, did you agree with that conclusion?

Dr. Infante. Yes.

Mr. Martonik. Yes, I did.

The Chairman. So this was the scientific conclusion of OSHA's Health Standards staff.

Now, Dr. Rodgers, did OSHA submit the September 15th draft to the Policy Review Board for approval?

Dr. Rodgers. Actually, that draft was prepared to go to OMB. We didn't have a Policy Review Board meeting on formaldehyde. The Policy Review Board consisted of Mr. Pendergrass and Mr. Baroody in this case. We did not have a formal meeting.

The Chairman. Okay. And did they refuse to release the standard to OMB for its approval?

Dr. Rodgers. The Department of Labor refused to release it.

The Chairman. Mr. Pendergrass and Mr. Baroody—their names keep coming up in this type of context.

While the Policy Review Board was holding up the standard, did you attend a meeting with Deputy Assistant Secretary Frank White to discuss the draft of the final standard?

Dr. Rodgers. Yes.

The Chairman. Were you told at the meeting that as a result of these discussions between Assistant Secretary Pendergrass and Assistant Secretary Baroody that Mr. Pendergrass had agreed to a request from Mr. Baroody to consider not using the new cancer risk assessment?

Dr. Rodgers. Yes. I was informed that he had agreed to revisit the issue of the appropriateness of our risk assessment and that they preferred to use lower estimates from the three- or five-stage maximum likelihood estimate.

The Chairman. Well, in plain words, they were rejecting the new data, new scientific data, that the health panel have accepted from a scientific point of view that would have provided additional protection for workers.

Dr. Rodgers. Yes.

The Chairman. Now, Mr. Martonik, did Mr. Pendergrass ask you to prepare an options memo laying out alternative ways to express the cancer risk?

Mr. Martonik. Yes, he did.

The Chairman. And did you prepare such a memo?

Mr. Martonik. We prepared a memo, yes.

The Chairman. I believe that this is the memorandum?

Mr. Martonik. Yes.

The Chairman. It says: "First, as members of the Office of Risk Assessment assigned responsibility for the formaldehyde project, we wish to go on record as expressing our professional opinion that the quantitative risk assessment for cancer presented in the September 15, 1987 draft is the only option that fully uses all the relevant information on cancer risk that is consistent with the record developed on formaldehyde."

[The memo referred to follows:]

OFFICIAL USE ONLY

MEMORANDUM FOR: John Pendergrass
Assistant Secretary

FROM: John Martonik
Acting Director, Office of Risk Assessment
Imogene Rodgers, Ph.D.
Project Officer, Formaldehyde

SUBJECT: Options for the Assessment of Risk from Exposure to Formaldehyde

This memorandum responds to a request by Mr. Frank White, Deputy Assistant Secretary, on October 6 for alternatives to express the risk to workers from exposure to formaldehyde.

First, as members of the Office of Risk Assessment assigned responsibility for the formaldehyde project, we wish to go on record as expressing our professional opinion that the quantitative risk assessment for cancer presented in the September 15, 1987 draft is the only option that fully uses all of the relevant information on cancer risk and that is consistent with the record developed on formaldehyde.

Preferred Assessment of Risk

The September 15 draft accepts as reasonable all assessments in the record that use the multistage model of carcinogenesis and the CIIT rat data, corrected for animals sacrificed early in the experiment. Thus, a range, 43.3 to 1,820 cases per 100,000 workers is given as a reasonable estimate of risk at 3 ppm. OSHA does not have access to all of the data used by each investigator, however, and must rely on its own computer programs to make all of the calculations needed for the project. Therefore, we have also provided a "best estimate" of risk which, based on our judgment, is most consistent with a series of studies showing extra risk of cancer in humans exposed to formaldehyde. This estimate is the upper confidence limit (UCL) of the 5-stage model presented in OSHA's proposal. This model predicts that 834 cases per 100,000 workers will occur at 3 ppm and that risk will decrease to 264/100,000 at 1 ppm.

Alternatives that are Unacceptable

We feel that in following the OSTP Guidelines on Chemical Carcinogens, OSHA is compelled to examine all available epidemiological evidence when conducting a quantitative risk assessment based on animal data. The Agency, after all, is protecting humans, not rats. At the time of the proposal, only one study provided even limited data to estimate worker exposure, and OSHA addressed this information as follows [50 FR 50446]:

> The OSHA risk assessment predicts that workers exposed to 3 ppm formaldehyde have an excess cancer risk of approximately 7 per thousand...If formaldehyde was determined to be a human lung carcinogen, a cancer for which there is a 7 percent probability of death among adult white males, the relative risk or SMR from a study of workers exposed to 3 ppm should be approximately 1.10 (7.7%/7.0%). Such a relative risk most likely would not achieve a level of statistical significance, even in a large study. In this context, it is again noteworthy that the study of Acheson _et al_. demonstrated a significant excess of lung cancer (SMR=124) among the cohort of workers where the largest majority experienced "high" levels of formaldehyde (greater than 2 ppm), but that an excess of lung cancer was not observed at five additional facilities, where the majority were exposed to "low" or "nil" levels (less than 0.1 to 0.5 ppm).

After the proposal was published, three new epidemiologic studies became available where some estimate of exposure potential could be made [Blair _et al_. (NCI), Vaughan _et al_. (contracted by EPA), and Stayner _et al_. (NIOSH)]. The Blair _et al_. study contained an elaborate analysis designed to assign an exposure profile to each worker in the cohort. Consistent with recent approaches taken by the CPSC and the EPA since the Blair _et al_. study was released, OSHA continued to rely on the animal data to develop a dose response curve and examined the reasonableness of the predictions by comparing the results to available human evidence. On this basis, we must reject the 5-stage MLE estimate of risk, which is 0.56 cases/100,000 workers at 1 ppm. The Blair _et al_. study shows a lung cancer risk 1,543 times greater than this estimate and a nasopharyngeal cancer risk 39.3 times greater. Such discrepancies cannot be explained by possible errors in exposure estimates, by differences in smoking patterns, or by exposures to ther toxic substances in the workplace.

It would be possible to perform a quantitative estimate of risk on the basis of the Blair _et al_. study. The information contained in the study is at least as good as other information that OSHA has used in the past, and the use of human data overcomes the difficulties in assigning proper scaling factors when converting animal data to humans. We do not recommend this approach. A reviewing court would probably be concerned about proper notice since OSHA made no indication in the proposal that such an attempt might be made. Furthermore, it would embroil OSHA unnecessarily in controversies among scientists regarding Blair et al's conclusions regarding lung cancer. It would also be contradictory to the formaldehyde record since numerous commenters alleged serious charges regarding the conduct of the study. OSHA does not need to become involved in these issues since we hope that a study in which the highest exposure was 37 ppm-yr (0.8 ppm for 45 year working life) showed "little evidence of cancer at the levels of exposure experienced by these workers", as stated by the authors.

Option II: This option would rely on both the UCL from the 5-stage model and the maximum likelihood estimate (MLE) from the 3-stage model.

Two advantages to this approach could be construed. First, the UCL from the 5-stage model provides the best fit to the observed lung cancer rates in Blair et al. (the human data is 3.3 times higher than the risk predicted by the model) and the MLE from the 3-stage model provides the best fit to the nasopharyngeal cancer data (Blair et al. is 0.63 times the rate predicted by the model). Thus, OSHA could take the position that these are ranges of risk depending on the sites ultimately affected by formaldehyde exposure. Second, use of parts of the two models preserves some of the rhetoric used in the proposal so that there is apparent consistency from the proposal to the final.

There are numerous disadvantages to this approach. First, the approach does not make much sense. It is not readily apparent how one would support using an MLE in one case and a UCL in another. Second, the 3-stage model does not provide a good fit to the animal data, and its only obvious advantage is that it is consistent with classical statistics. Third, the two models, the 3-stage MLE and the 5-stage UCL, ultimately yield nearly the same results. The 5-stage model predicts that 49 cases of cancer will be averted; the 3-stage model predicts that 66 cases will be averted. Fourth, the justification for use of the 3-stage MLE appears to be primarily only that "we always do it that way" which ignores the biological reasons why a human exposed to formaldehyde should be at greater low dose risk than a rat. The type of cancer developed by the rat is rare; a mixture of cancers would be expected in humans, and some of the sites are common, leading to a much greater likelihood that interactive effects would occur. Formaldehyde disturbs mucociliary clearance which would increase risks associated with smoking. Inbred rats are genetically homogeneous compared to humans, so that a wider range of responses would be expected in humans. Many humans received exposure to formaldehyde gas and to formaldehyde entrained on inhaled particles, enhancing the risk of cancer. Finally, several mechanisms may be responsible for the response seen in rats at 14.3 ppm; some may be irrelevant at low doses. All of the above factors would cause the human to be at greater risk from low dose exposure than the rat, suggesting that reliance placed on the MLE from the animal data would underpredict risk to humans.

Option III: This option would rely only on the 3-stage multistage MLE estimate to predict cancer.

The advantage to this approach is that it was announced as an option in the proposal.

The disadvantages to this approach are that it is out of step with current risk assessment practice and is not wholly supported by the formaldehyde record. All of the disadvantages for Option II also apply.

RISK OF CANCER PER 100,000 WORKERS

EXPOSURE LEVEL (ppm)	5-STAGE MODEL MLE	5-STAGE MODEL UCL	3-STAGE MODEL MLE	3-STAGE MODEL UCL
3	71	834	936	1378
1	0.56	264	35	185
0.5	0.03	132	4.4	80

BEST AVAILABLE HUMAN EVIDENCE

LUNG CANCER: SMR=130 at 1 ppm, annual incidence rate 64/100,000, 864 cases per 100,000 predicted.

BUCCAL CAVITY/PHARYNX: SMR=230 at 1 ppm, annual incidence rate 0.4/100,000, 22 cases per 100,000 predicted.

CASES OF CANCER AVERTED

MODEL	CASES
3-Stage MLE	66.4
3-Stage UCL	91.9
5-Stage MLE	6.5
5-Stage UCL	49.3

FIT OF BLAIR DATA TO RISK MODELS
(RATIO Blair *et al*. Figures to Model Estimate)

MODEL	LUNG CANCER RATIO	PHARYNGEAL CANCER RATIO
MLE, 5-Stage	1543	39.3
UCL, 5-Stage	3.27	0.08
MLE, 3-Stage	24.7	0.63
UCL, 3-Stage	4.67	0.12

The CHAIRMAN. Did you discuss the memo with the Assistant Secretary?

Mr. MARTONIK. Yes, I did.

The CHAIRMAN. And Dr. Rodgers, did the Assistant Secretary indicate that he wanted to conclude that the cancer risk to workers under the new standard would be insignificant even though, in your opinion as a scientist, the data indicated otherwise?

Dr. RODGERS. Yes, he did.

The CHAIRMAN. And did Mr. Pendergrass leave the meeting to meet with Assistant Secretary Baroody before the issue was resolved?

Dr. RODGERS. That was my understanding of where he was going.

The CHAIRMAN. And on the following day, were you ordered to change the risk assessment to conclude that the cancer risk to workers at the one part per million exposure limit was insignificant?

Dr. RODGERS. I was ordered to take away the sharpness of our best estimate and remain with a wide range of estimates and to take away the word "significant".

The CHAIRMAN. Well, we can draw our own conclusion as to whether we think that enhances and strengthens or whether it weakens the message.

We have a copy of the September 15th draft final standard, which seems to indicate to me that Assistant Secretary Pendergrass ordered Frank White, his Deputy, to change the risk assessment. On the cover is a note from Frank White to the Assistant Secretary which states: "This is the key revised section in formaldehyde. It looks okay, except for the page I have marked, and this will be deleted."

And then, if you look back to the part to be deleted, it says, "the one part per million alone probably does not completely eliminate significant risk as defined by the court in the benzene case decision. Lowering the PEL to .5 ppm would lower this risk to approximately one in 1,000, still a significant risk." That is circled, and at the bottom of that page it says, "I have talked to Chuck A., and this will come out."

[Information supplied follows:]

ROUTING AND TRANSMITTAL SLIP Date 10/15/87

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. ~~Frank White~~		
2. John P		
3.		
4.		
5.		

✓	Action		File		Note and Return
	Approval		For Clearance		Per Conversation
	As Requested		For Correction		Prepare Reply
	Circulate		For Your Information		See Me
	Comment		Investigate		Signature
	Coordination		Justify		

REMARKS

Per your request: 2 copies of alternative approach to assessing formaldehyde's risk.

Fred Siskind has also received a copy with the understanding that it is not yet approved.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
Jean Rodgers	Phone No. 553-7157

5041-102

OPTIONAL FORM 41 (Rev. 7-76)
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10/16

John —

This is the key revised section in formaldehyde; it looks o.k. except for the page I've marked & this will be deleted — Frank W.

discussed in the previous paragraphs concerning the reasonableness of the risk assessment.

The new PEL substantially reduces the signficant risk incurred by exposures at 3 ppm. The dose-response relationship indicates that reducing exposure reduces risk. The 5-stage UCL estimates of risk indicate that the new standard would reduce the risk by a substantial 67 percent. MLE estimates are based on dose-response curves that show a steeper slope, and they predict even greater reductions in risk. For example, the Clement Associates MLE estimate indicates a reduction of 96 percent. OSHA concludes on this basis that the new PEL substantially reduces the risk of cancer to workers.

A 1 ppm PEL alone probably does not completely eliminate significant risk as defined by the Court in the Benzene decision since OSHA's plausible mid-range estimates of extra risk for a 1 ppm PEL are greater than 1 in a thousand. Lowering the PEL to 0.5 ppm would lower this risk to approximately 1 in a thousand, still a significant risk. Lowering the PEL further, to 0.1 ppm, would result in an extra risk well below 1 in a thousand.

OSHA believes that the presence of the additional provisions in the formaldehyde standard act t
occupational exposure to formaldeh
less than that predicated on the b
Provisions, such as annual training

J.P. - 10/16
I've talked
to Chuck A.
and this will
come out -
Frank

The **Chairman**. Now, penciling out that provision does what, Dr. Rodgers?

Dr. **Rodgers**. The thrust seemed to be to take away the idea that formaldehyde caused cancer, the concern then being that workers might not be informed of the information that formaldehyde had caused cancer in animals and probably in humans.

The **Chairman**. Who is Chuck A.?

Dr. **Rodgers**. He is our Division Director of Health Standards Programs, Charles Adkins.

The **Chairman**. So this is the way it ended up in the final standard; is that right?

Dr. **Rodgers**. Substantially. OMB required us to remove some additional information as well.

The **Chairman**. OMB required it.

Dr. **Rodgers**. Yes.

The **Chairman**. Well, did that strengthen——

Dr. **Rodgers**. It weakened it more.

The **Chairman**. It weakened it more.

Dr. Infante, as the Director of the Office of Risk Assessment, did you subsequently write a memo to the Assistant Secretary, objecting to the watering-down of the risk assessment, indicating it did not reflect the opinion of OSHA's health scientists?

Dr. **Infante**. Yes, I did.

The **Chairman**. I will include the memo in the record.

[The memo referred to follows:]

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

November 6, 1987

MEMORANDUM FOR: John Pendergrass
Assistant Secretary

THROUGH: Charles E. Adkins
Director
Health Standards Programs

FROM: Peter F. Infante
Acting Director
Office of Risk Assessment

SUBJECT: OSHA's Final Determination of Cancer Risk Related to Occupational Exposure to Formaldehyde

As part of my recent additional assignment as Acting Director of the Office of Risk Assessment, I have reviewed the draft formaldehyde standard dated 10/19/87 that was submitted to OMB for review in October. I am concerned about the significant departure from the evaluation of cancer risk as discussed in the 9/1/87 draft as compared to the version sent to OMB. I am equally concerned about the change in interpretation of the residual risk that will result from the new standard.

In the 10/19/87 draft standard, the estimated extra cancer risk as a result of an occupational lifetime exposure (45 years) to 1 ppm formaldehyde ranges from 0.006 to 2.64 per 1000 workers. The lower estimates of risk was based on the maximum likelihood estimate (MLE) and upper estimate was based on the upper 95% confidence limit (UCL) using the 5th stage of the multistage mathematical model and data from the CIIT study of formaldehyde inhalation in the rat. While these are the best data available to determine specific dose response for cancer related to formaldehyde exposure, one should interpret these data in view of epidemiologic study results when the latter are available.

In this regard there are several epidemiologic studies which serve to augment the dose response data from the animal study. For example, Table 7 of the Blair study demonstrates a significant 35% excess of lung cancer for workers exposed to formaldehyde and who had been followed for more than 20 years, a period of follow-up necessary to allow solid tumors to manifest themselves clinically. The NCI data for lung cancer were also analyzed by Sterling and Weinkam who demonstrated a significant

36% excess of death from lung cancer among wage earners exposed to formaldehyde levels greater than 0.5 ppm as compared to those who were exposed to less than 0.5 ppm. The average exposures for these two groups were 1.16 ppm and 0.18 ppm, respectively.

Although health standards staff did not use the Blair study to determine dose-response (because of the narrow dose categories for workers exposed to low levels of formaldehyde and potential confounding bias from cigarette smoking), the study clearly demonstrates a significant excess of lung cancer for workers who were exposed to average formaldehyde levels of 1.16 ppm. Thus, the range of risks that OSHA has concluded are associated with 1 ppm formaldehyde (0.006-2.64 per 1000) based on the animal data appear to tremendously underestimate the risk based upon epidemiologic observations. A 38% increase in lung cancer related to 1.16 ppm would result in an excess lung cancer risk of 26 per 1000 workers. Thus, health standards staff had a greater preference for the upper end of the risk range (2.64/1000), which is still 10-times lower than an estimate based upon epidemiologic data. This risk is clearly in the range of risks that OSHA considered significant in previous rulemakings and was the preferred estimate by OSHA staff in the 9/1/87 draft of the final standard.

Although the Blair study demonstrated a significant excess of lung cancer, he was not convinced that formaldehyde caused the excess because he did not observe an increased risk of lung cancer with an increase in cumulative dose of formaldehyde. However, the data from Blair's study provide very good indirect evidence that an increase in cumulative dose of formaldehyde is associated with a decrease frequency of cigarette smoking. (This may be a reflection of cessation of smoking because of the irritating properties of formaldehyde to the lungs.)

As pointed out in the hearing record, the data in Table 4 of the Blair study show an inverse relationship between cumulative exposure to formaldehyde and death from the causes known to be related to cigarette smoking, i.e., emphysema, bladder cancer and arteriosclerotic heart disease. Since cumulative exposure is heavily dependent upon length of employment, one should also expect to see in the Blair data a reduction in lung cancer risk with increasing length of employment. This observation which is consistent with the cigarette smoking selection bias mentioned above can be seen in Blair Supplemental Table 4.

What all of this means is that there is evidence in the Blair study that individuals who were employed for longer periods of time and who have had a greater cumulative dose of formaldehyde probably smoked less. Therefore, one would not expect to find an increased risk of lung cancer related to an increase in cumulative dose of formaldehyde.

It is important to note, however, that both the Blair study and the Acheson study show an increase in lung cancer risk with an increase in formaldehyde exposure level (though not with cumulative dose).

The epidemiologic data and other evidence in the record suggest that the UCL is more likely to be in line with the cancer risk of formaldehyde to humans. Therefore, HSP staff are of the opinion that the characterization of the estimated cancer risk as presented in the draft that went to OMB does not reflect its opinion. Furthermore, staff who worked on the analysis of the cancer risk do not share the view stated on pages 344 of the 10/19/87 draft that "OSHA concludes that a PEL of 1 ppm with the additional provisions of this standard will eliminate the significant risk of cancer."

In the final standard, one could simply state that the remaining risk at a new PEL along with the additional provisions of the standard will lead toward insignificant cancer risk without stating that the cancer risk is insignificant. This is a more solid statement scientifically since it is difficult to quantify the reduction in cancer risk through the ancillary requirements.

Although judicial review is not my area of expertise, an incorrect interpretation of the factual evidence will weaken the Agency's position in response to legal challenges.

If you have time available, I would like to meet with you to discuss the epidemiologic data as they relate to the dose response data from experimental animals.

cc: Frank White

Dr. Rodgers, now that the risk assessment was weakened, did the Policy Review Board release the standard to OMB?

Dr. Rodgers. Yes.

The Chairman. And did you participate in the meetings with the OMB?

Dr. Rodgers. I participated in several meetings with OMB between November 4th and November 13th.

The Chairman. And did they suggest one or two minor revisions, or did they have more extensive and substantive suggestions?

Dr. Rodgers. OMB had very extensive suggestions.

The Chairman. I have a copy of OMB's suggested revisions to the medical surveillance provisions. Dr. Rodgers, if this proposed insert were adopted, wouldn't it be the case that a worker could only receive a medical examination if he or she filled out a medical questionnaire indicating that they were having health problems?

[Information supplied follows:]

[illegible] FAX: 523-7312

To: Charles Adkins
OSHA
Room N-3718
Dept. of Labor
523-7075

Call immediately for pick-up

From: Scott Jacobs
Room 3208
395-6880

INSERT 1

p. 625

(f)(2)(ii) Once the employer has reduced exposures to or below the TWA in compliance with paragraph (f)(1), the employer may use any combination of engineering controls, work practice controls, or respiratory protection to reduce employee exposure to formaldehyde to or below the STEL.

INSERT 2

p. 634

(l) Medical Surveillance. (1) Employees Covered. (i) The employer shall make a medical disease questionnaire, such as in Appendix D, which is designed to elicit information on work history, smoking history, any evidence of eye, nose or throat irritation, chronic airway problems or hyperactive airway disease, allergic skin conditions or dermatitis, and upper and lower respiratory problems, available

(A) upon request to any employee exposed to formaldehyde who develops signs or symptoms indicative of overexposure to formaldehyde;

(B) to all employees exposed to formaldehyde in emergencies.

(2) Signs and Symptoms Training. The employer shall ensure that employees exposed to formaldehyde are informed of the relevant signs and symptoms of overexposure to formaldehyde. This information shall be conveyed through training conducted in compliance with 29 CFR 1910.1200(h) and through the training required in paragraph (n) of this section.

(3) Medical Procedures. All medical procedures, including administration of medical disease questionnaires, shall be provided without cost to the employee, without loss of pay, and at a reasonable time and place. All medical examinations and evaluations of medical disease questionnaires shall be performed by or under the supervision of a licensed physician.

(4) Medical Examination. (i) The medical disease questionnaire shall be evaluated by a licensed physician, who shall determine whether a medical examination is necessary. Medical examinations shall be given to any employee who the physician feels, based on information in the medical disease questionnaire, is at increased risk from formaldehyde exposure or is experiencing formaldehyde-related signs and symptoms.

(ii) In addition, medical examinations shall be given at the time of the initial assignment and at least annually thereafter to each employee required to wear a respirator to reduce exposure to formaldehyde to the TWA and the STEL.

(iii) The medical examination shall include:

(A) [begin with language at (l)(4)(i) and, relabeling as necessary, go verbatim to end of section).

(2) The employer shall limit access to regulated areas to authorized persons who have been trained to recognize the hazards of formaldehyde.

(3) An employer at a multiemployer worksite who establishes a regulated area shall communicate the access restrictions and locations of these areas to other employers with work operations at that worksite.

(f) Methods of compliance. (1) Engineering controls and work practices. The employer shall institute engineering and work practice controls to reduce and maintain employee exposures to formaldehyde at or below the TWA, ~~and the STEL~~.

(2) Exception. (i) Whenever the employer has established that feasible engineering and work practice controls cannot reduce employee exposure to or below ~~either of~~ the TWA ~~PELs~~, the employer shall apply these controls to reduce employee exposures to the extent feasible and shall supplement them with respirators which satisfy this standard.

Respiratory protection. (1) General. Where respiratory protection is required, the employer shall provide the

Appropriate portions of the plan shall be implemented in the event of an emergency.

(2) All employees shall be thoroughly trained of their responsibilities in the event of an emergency.

(3) The employer shall assure that appropriate equipment and supplies are accessible to employees in the event of an emergency.

(4) The employer shall make provisions for immediate evacuation, transportation, and medical assistance at a designated medical facility for affected employees.

(5) The employer shall assure that only designated personnel wearing appropriate personal protective equipment and trained in emergency procedures remain for emergency shut-down.

(6) All employees, except those designated to correct the situation, shall be evacuated from the area where the emergency occurred until cleanup has been completed.

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Medical surveillance. (1) Employees covered. (i) The employer shall institute medical surveillance programs for all employees exposed to formaldehyde at concentrations at or exceeding the action level or exceeding the STEL.

(ii) The employer shall make medical surveillance available for employees who develop signs and symptoms of overexposure to formaldehyde and for all employees exposed to formaldehyde in emergencies.

(2) Examination by a physician. All medical procedures, including administration of medical disease questionnaires, shall be performed by or under the supervision of a licensed physician and shall be provided without cost to the employee, without loss of pay, and at a reasonable time and place.

(3) Medical disease questionnaire. The employer shall make the following medical surveillance available to employees prior to assignment to a job where formaldehyde exposure is at or above the action level or above the STEL and annually thereafter. The employer shall also make the following medical surveillance available promptly upon determining that an employee is experiencing signs and symptoms indicative of possible overexposure to formaldehyde.

(i) Administration of a medical disease questionnaire, such as in Appendix D, which is designed to elicit information on work history, smoking history, any evidence of eye, nose, or throat irritation; chronic airway problems or hyperreactive airway disease, allergic skin conditions or dermatitis; and upper or lower respiratory problems.

(ii) A determination by the physician, based on evaluation of the medical disease questionnaire, of whether a medical examination is necessary for employees not required to wear respirators to reduce exposure to formaldehyde.

(4) Medical examinations. Medical examinations shall be given to any employee who the physician feels, based on information in the medical disease questionnaire, may be at increased risk from exposure to formaldehyde and at the time of initial assignment and at least annually thereafter to all employees required to wear a respirator to reduce exposure to formaldehyde. The medical examination shall include:

(i) A physical examination with emphasis on evidence of irritation or sensitization of the skin and respiratory system, shortness of breath, or irritation of the eyes.

(ii) Laboratory examinations for respirator wearers consisting

Dr. RODGERS. That is so.

The CHAIRMAN. All right. Wouldn't it also be the case that if a worker were so ill from an acute exposure to formaldehyde that he or she could not fill out the questionnaire, that the worker would not receive such a medical exam?

Dr. RODGERS. That is certainly how it seems to read.

The CHAIRMAN. I understand that OSHA did not adopt this suggestion, but it appears that OMB was able to change the standard from the way you had originally written it.

The chart here on the right, "OMB Changes to the Formaldehyde Standard, OSHA Version, Final Rule". I will not take the time of the Committee, and we will include the chart in a smaller version in the record. You have the OSHA version, final rule, requirement deleted, continuing down, requirement deleted, requirement deleted, requirement deleted, requirement deleted, and the others—certainly a reduction in terms of the kinds of protections.

[The chart referred to follows:]

OMB CHANGES TO THE FORMALDEHYDE STANDARD

	OSHA VERSION	FINAL RULE
EXPOSURE MONITORING	Required exposure monitoring every 3 months if last monitoring above the time weighted average.	Requirement deleted.
	Required monitoring for STEL "at least every six months."	Requires monitoring for STEL "at least once a year under worst conditions."
	Required all covered employers to monitor employees to determine their exposure to formaldehyde.	Requirement changed so that employers need not initiate exposure monitoring unless there is a formaldehyde hazard or employee health complaints.
EMERGENCIES	Required written plans for responding to emergencies.	Requires employer to assure that appropriate procedures are adopted.
	Required thorough training of employees about the emergency plan.	Requirement deleted.
	Required employer to assure accessibility of appropriate equipment and supplies in the event of an emergency.	Requirement deleted.
	Required employer to make provisions for immediate evacuation, transportation, and medical assistance at a designated medical facility for affected employees.	Requirement deleted.
	Required that only trained personnel wearing proper clothing remain in the workplace during an emergency shut-down.	Requirement deleted.
	Required evacuation of employees until clean-up has occurred.	Requirement deleted.
MEDICAL SURVELLANCE	Required employer to make medical surveillance available to all employees who develop signs and symptoms of formaldehyde exposure and all employees exposed in emergencies.	Includes language making it more difficult to require medical surveillance for employees exposed at low levels.
HYGIENE PROTECTION	Required employers to provide showers for employees who are required to change from work clothing into protective clothing to prevent skin contact with formaldehyde.	Requirement deleted.

The CHAIRMAN. Dr. Rodgers, did the changes documented on this chart come from OMB?

Dr. RODGERS. Yes.

The CHAIRMAN. Are the changes significant?

Dr. RODGERS. The changes are less significant than some of the things that OMB asked us to do. They even went so far as to request that we take formaldehyde, not issue a rule, and put it under the PEL project.

But yes, the changes that they did enforce upon us are significant.

The CHAIRMAN. Is the standard less protective for workers as a result?

Dr. RODGERS. Yes.

The CHAIRMAN. Dr. Infante, do you agree?

Dr. INFANTE. Yes, I do.

The CHAIRMAN. Mr. Martonik?

Mr. MARTONIK. I do agree.

The CHAIRMAN. Dr. Rodgers, after the final standard was published, did OMB disapprove certain provisions of the standard under Paperwork Reduction just as they did under the Hazard Communication Standard?

Dr. RODGERS. Yes, they did.

The CHAIRMAN. And did OMB disapprove the requirement for cancer warning labels on products containing formaldehyde?

Dr. RODGERS. Yes, they did.

The CHAIRMAN. And when OMB disapproved that requirement, was there a petition pending from the Formaldehyde Institute to stay the cancer warning label requirements?

Dr. RODGERS. Yes, there was.

The CHAIRMAN. So OMB in effect granted the Formaldehyde Institute's petition for a stay by disapproving the requirement under the Paperwork Reduction Act; is that correct?

Dr. RODGERS. That is correct.

The CHAIRMAN. Mr. Martonik, regarding OMB's disapproval, what is OSHA doing now?

Mr. MARTONIK. At this time, we are planning to resubmit a request to OMB to reconsider their decision and to grant us approval to enforce those Hazard Communication provisions of the formaldehyde standard.

The CHAIRMAN. So it took seven years and numerous battles with the PRB and OMB to publish a final standard. The standard which was published departed significantly from the way all three of you, as health scientists, thought it should be and is seriously less protective for workers as a result.

We welcome the Senator from Illinois, Senator Simon. We are in a situation, Senator, where we have one more area that we will be going into with regard to health and safety, and then we will go to the next panel. We do have a vote on, Senator Simon. We would be glad to recognize you, and then I would prefer that we go over and vote and come back, rather than interrupt the panel.

Senator SIMON. I have one question, and I would ask that maybe you submit this in writing—and this, I recognize, is a little bit of an unusual question.

But if, suddenly, each of you were to be put in charge of OSHA—it is not likely to happen tomorrow, but let's just assume——

The **Chairman**. Maybe after November. [Laughter.]

Senator **Simon** [continuing]. Yes—if each of you were to be put in charge, what would you be doing to protect American workers more effectively? I would be interested in having that in writing for the record.

Thank you, Mr. Chairman.

[Information supplied follows:]

Senator Simon's question:

> "If each of you were to be put in charge [of OSHA], what would you be doing to protect American workers more effectively?"

Response by

Peter F. Infante, DDS, DrPH

Director, Office of Standards Review;
Acting Director, Office of Risk Assessment
Health Standards Programs
Occupational Safety and Health Administration

If I were asked to accept the position of Assistant Secretary for OSHA, I would do so only after assurances that there would be a commitment from the White House to reduce death, injury and disease related to the occupational environment.

With the above mentioned commitment, the Agency would not have to worry about OMB interference in safety and health standards setting. It is my opinion that OMB could carry out its function under the Paperwork Reduction Act without seriously weakening standards and delaying the promulgation of standards as it currently does. The long hours of discussion between OMB economists and Health Standards Programs (HSP) staff involving the interpretation of epidemiologic and toxicologic studies and quantitative cancer risk assessment, etc. borders on the absurd, as do OMB's attempts to force upon the Agency evaluations of toxicity for substances we list in our Regulatory Agenda. I find it equally counterproductive to have OMB hold key elements of standards hostage by threatening not to approve the paperwork burden until OSHA agrees to remove provisions of standards that the staff feels necessary to protect workers from injury and disease.

With the above mentioned commitment from the Executive Branch, the philosophy of the Office of the Assistant Secretary for Policy, which is currently directed to work with OMB to carry out regulatory relief, would be more in harmony with that of the Occupational Safety and Health Act, which is to protect workers from death and disease in the workplace.

Given the above assurance, I would accept the position of Assistant Secretary for OSHA and would do the following:

(1) I would ask for a larger budget--one that would reflect a serious commitment toward occupational safety and health and be more commensurate with the magnitude of the problem of injury and disease in the workplace.

(2) I would increase considerably the size of the staff in HSP and in Safety Standards by hiring well trained or well qualified individuals. I would also create several senior scientist positions in these Directorates to provide high level full time expertise the time to analyze data and write standards. (Currently, senior positions in these Directorates are allocated only for administrative functions.) This practice would be more cost efficient than procuring these services on contract, and would result in more "agency memory" through the development of multiple standards.

(3) I would increase the number of compliance officers and increase the number of area offices. The former would result in more inspections and the latter would make the Agency more responsive to complaints and would reduce some operating costs by reducing travel expenses for compliance officers.

(4) I would have compliance officers conduct more repeat inspections where the initial inspection found serious violations.

(5) I would work toward changing the DOL statute related to penalties for violations that are serious or willful and that resulted in permanent injury, disability or death. The schedule of fines needs to be restructured.
  (a) The maximum fines for serious and willful violations should be increased and the burden of proof for a willful violation should be lessened.
  (b) In the current situation, a serious violation resulting in a loss of life carries with it a fine ranging from 0-$1000.

(6) On the other hand, I would evaluate and perhaps modify the current Voluntary Protection Plan (VPP) in order to establish more incentives for employers to improve the workplace on a voluntary basis.

(7) I would refer to the Justice Department for criminal prosecution a larger number of cases of willful violation that result in death of a worker.

(8) I would work for congressional restructuring of the federal statute related to workers' compensation. Workers' compensation should be paid by industry as part of its cost of production. Yet, the last report by DOL on this subject in 1980 indicates that only 5% of the income for those off the job because of an occupational illness is paid by industry, whereas 86%

is paid by public programs, i.e., social security, veterans benefits, welfare. The burden of proof for workers who develop debilitating disease on the job obviously needs to be lessened.

(9) I would put more emphasis on the Hazard Communication Standard by targeting specific substances with known toxic effects for accurate reporting on the material safety data sheets (MSDSs). Based upon MSDSs that I have reviewed, the reporting of toxic effects is poor and inconsistent.

(10) I would promulgate a generic standard for monitoring substances for which there are OSHA permissible exposure limits (PELs). Currently monitoring is required for less than 10% of the substances. Thus, employers often do not know whether they are exposing workers to impermissible levels of toxic substances. If an OSHA compliance officer makes an inspection and finds a violation for a substance that poses a serious hazard, the fine will be minimal and is often cheaper than monitoring. Thus, there is no incentive for employers to determine whether or not they are in compliance with federal standards.

(11) I would suspend all current OSHA deregulatory activities such as the proposal for Methods of Compliance which will only result in allowing more use of respirators. Changing the philosophy currently in place for the

hierarchy of controls of toxic substances will cause more occupational disease and is contrary to good industrial hygiene practice, contrary to the philosophy of the current and past Assistant Secretaries for OSHA and contrary to the philosophy of all HSP staff.

(12) A major effort needs to be undertaken to estimate the amount of chronic disease related to occupation.

(a) The Bureau of Labor Statistics (BLS) reporting requirements need to be changed to separate an occupational injury from an illness and reporting of diseases related to an occupational exposure should be required whether or not causality is proven. Such a reporting mechanism, however, will still miss the major component of occupational disease--that which manifests itself after termination of employment.

(b) Because of the problems encountered with (a) above, a random survey of the entire U.S. or of selected states with heavy industry needs to be conducted to evaluate the magnitude of disease caused in the workplace.

(12) I would encourage Congress to conduct more frequent and systematic oversight hearings concerning OSHA's performance of its mission.

FACTORS RELATED TO IMPROVING OCCUPATIONAL SAFETY AND HEALTH THAT ARE NOT RELATED TO DOL

(1) NIOSH should be elevated to the level of NIH.

(2) The NIOSH budget should be tripled.

  (a) Specific NIOSH funds should be allocated for grants to undergraduate medical institutions to train physicians in occupational medicine. Industrial medicine is not often taught in American medical schools and relatively few physicians recognize occupational disease. In a recent survey of U.S. medical schools only 66% of the schools stated that occupational health was specifically taught at their schools; in only 54% was it a required part of the curriculum. The median required curriculum time was four hours in the preclinical years.

  (b) It is imperative that NIOSH place more emphasis in construction safety research as well as research for better personal protective equipment. NIOSH has de-emphasized this area of research in the past several years.

A FINAL COMMENT TO CONGRESS

The passage of the OSH Act has obviously had a major beneficial impact on the lives of American workers. Over the past 10 years of my work at OSHA, I have come to realize that regulation is important and that it is difficult, time consuming and expensive. In some cases failure to regulate has been more expensive in terms of economic drain on the country through job loss, social services and medical care for diseased workers. In some cases, new health standards have resulted in actual economic benefits to the regulated industry.

There are areas where we have made mistakes as an Agency and areas where we have made progress. After almost 20 years of experience under the OSH Act there are areas that clearly need to be rehabilitated or modified. We should be moving into a new era of modern industrial safety and health, but we seem to be moving too slowly to correct our present limitations.

Congress passed the OSH Act in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." It's been 20 years since the passage of the Act, and I hope Congress can show a recommitment to its goal for workers by appropriating money and resources to both OSHA and NIOSH that are commensurate with the task before us.

I have indicated just some of the changes I would implement if I were put in charge. Many more, however, also need to be addressed.

I appreciate the opportunity to respond to your question.

Sincerely,

Peter F. Infante

Peter F. Infante, DDS, DrPH

OSHA – The Gordian Knot ?*

Susan E. Harwood, Ph.D.

> "I have one question...if each of you were put in charge, what would you be doing to protect American workers more effectively?"

I've taken liberties with Senator Simon's question. In order to effectively change the current situation, there must be a commitment at the highest level of government. Therefore, I have appointed myself President of the United States.

As President, I would commit my Administration to promoting and improving occupational safety and health, and I would see that the message was carried directly to the American people. It is time for occupational safety and health to move from an obscure backwater of public health to the mainstream. Most adult Americans are in the workforce, and they need to be both informed about and protected fromthe hazards they face at work.

We all agree that it is a tragedy when a young man dies of a cocaine overdose, but is it any less a tragedy if he dies as the result of a preventable industrial accident? We all agree that it is a tragedy when a woman gives birth to a infant who is blind because she has been exposed to rubella or has taken a particular prescription drug, but is it any less a tragedy if the damage results from exposure to a toxic chemical in her workplace? It was a personal tragedy when my father died at age 62 of heart and lung disease after smoking cigarettes for 40 years, but it would have been no less a tragedy if he had died of mesothelioma as the result of asbestos exposure. Yet, although we are willing to spend large sums of money to fight drug abuse, test prescription drugs, vaccinate our children, and discourage smoking, our financial commitment to occupational safety and health is pitifully small.

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*A paper prepared for the Senate Committee on Labor and Human Resources at the request of Senator Paul Simon

To remedy this situation, I would increase the budgets of both OSHA and NIOSH in order to ensure that these agencies have the personnel and other resources that are necessary to carry out their mission.

I would instruct the Secretaries of Labor and Health and Human Services to cooperate with each other and coordinate OSHA/NIOSH activities. With greater partnership we could regulate when it is necessary (e.g. formaldehyde, bloodborne diseases) and use nonregulatory approaches to other problems when that is appropriate. I would separate NIOSH from the Centers for Disease Control, give it a separate budget, and make it equivalent in status to the other Institutes such as the National Cancer Institute and the National Institute for Allergy and Infectious Diseases.

The Office of Management and Budget has been a constant obstacle to OSHA's standard setting activities. I would inform the Director of OMB that they would no longer dictate or delay OSHA's regulatory activities. There would be an end to debates on scientific matters between OMB's economists and OSHA's scientists.

I would be willing to consider legislation amending the Occupational Safety and Health Act to modify certain sections such as strengthening the provision that ensures protection for employee who complain to OSHA or walk off the job in a situation of imminent danger and modifying the provisions for promulgating an Emergency Temporary Standard so that the ETS would be restored as a useful tool.

Finally, I would chose an Assistant Secretary of Labor for Occupational Safety and Health who had a demonstrated, strong commitment to OSHA's mission to protect workers and was a highly respected professional in one field of occupational safety and health. This individual should have both the vision and the leadership needed to correct OSHA's existing problems and prepare the Agency to move into the Twenty-first Century.

Once he or she is confirmed, I would expect this person to immediately to do the following:

(1) Begin to hire trained, competent staff for all parts of the agency. Special emphasis would be on the hiring of compliance officers, staff for Safety and Health Standards, and additional occupational physicians and nurses (The Agency currently has two physicians and no nurses.)

(2) Stop all deregulatory activities in Safety and Health Standards; move the group that performs economic analyses of standards from the Directorate of Policy into the Directorates of Health and Safety Standards to facilitate standards development

(3) Initiate an evaluation of both the locations and numbers of Area Offices and the current inspection system to ensure that adequate personnel, time, and resources would result in meaningful inspections

(4) Commit the Agency to the development and implementation of a proposed standard for bloodborne diseases.

Within a reasonable period of time I would expect the Assistant Secretary to:

(1) Establish a planning group that would:

(a) set priorities for Safety and Health Standards

(b) anticipate new hazards as greater numbers of workers move into the service industries

(c) investigate ways of encouraging the formation of labor/management occupational safety and health teams in individual companies

(d) develop a useful and accessible system for managing the data that comes to the Agency as the result of standards development and enforcement activities.

(2) Maintain competent, experienced professional and clerical staff by:

(a) Acknowledging professional accomplishment and rewarding good work;

(b) Initiating a vigorous program of professional development for staff so that staff members become recognized leaders in their professional fields; encouraging continuing education, certification where appropriate and membership in professional and technical societies

(c) Meet on a regular basis with staff (GS-13 and below) to hear new ideas, keep tabs on morale, and find out what is really happening in the trenches.

At this point, I would hang up my sword, resign the Presidency, and place the Country in another's hands.

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Every month or so there is a story in the Washington Post about a young man who is buried alive or killed when a trench caves in. OSHA has a regulation that specifies that a trench must be shored or sloped when it is deeper than five feet. And yet there continue to be cave-ins. Does this mean that the regulation is useless? Clearly, not! For every trench that is not shored, there are hundreds that are properly constructed. For every irresponsible employer there are thousands of employers who are responsible and abide by OSHA's regulations. But OSHA cannot police everyone who has a back-hoe and decides to dig a trench. The employer must be convinced that it is the best course to protect his/her workers and understand that enlightened self-interest dictates that he/she follow that course. The worker, too, must understand the potential for accident and injury and refuse, in this case, to go into the trench.

The problem is too great for OSHA to handle alone, but I think that it can be solved with the cooperation of the American workers and their employers.

A BLUEPRINT FOR A NEW OSHA

Imogene Sevin Rodgers, Ph.D.

April 26, 1988

INTRODUCTION

On April 19, at the Senate Labor Committee hearings, Senator Simon asked each member of the OSHA panel to submit in writing an answer to the question "if you were the Assistant Secretary, how would you run OSHA?" The following is my response.

I would be the first to admit that my immediate career goal is not to become Assistant Secretary; I would be happy to figure out how to advance to the position of Office Director.

Nevertheless, since starting to work for the government in 1976, I have had numerous occasions to observe how employers, employees, and the government view occupational safety and health. These observations along with assumptions about future trends influenced my response to Senator Simon.

ASSUMPTIONS

My first assumption is that OSHA's budget will grow modestly in the next few years, but the increase will not be dramatic. This is not to say I agree that the resources given OSHA to do its job are adequate. A safe and healthful place to work is a basic human need affecting every family in this country. Assuring that the United States has a healthy workforce should be a national priority. Unfortunately, the investment the nation makes to protect a vital resource, its workforce, is a pittance. OSHA does not offer "sexy" programs, such as Star Wars, the promise of a cure for cancer, or assurances that every son will grow up to be an Albert Einstein. Consequently, in a tight economy, squeezed by interest on a soaring national debt and huge medical costs expected from the AIDs epidemic, I do not believe that OSHA will obtain sufficient funding to dramatically alter its course.

My second assumption is that the changing workplace will make OSHA's job even more difficult. Present figures show that 17% of the nonagricultural workforce is unionized, and this number is shrinking. Jobs are being lost in manufacturing; at the same time employment in service industries is growing. Service industries tend to be smaller. Thus, a larger number of workers will be employed at facilities employing ten or less persons. These persons do not file complaints; they fear reprisals. If Congress continues to attach riders on our appropriations bill forbidding general inspections of such small facilities, more and more workers will fall outside OSHA's reach.

My third assumption is that OSHA will maintain a national presence with offices throughout the United States. At the same time, strong central management will be maintained over these offices so a unified position is presented to the regulated community. As a consequence, OSHA will continue to have a relatively large staff assigned to tasks related to operations management. Internal reports and tracking systems will remain critical to the effective operation of the Agency.

My fourth assumption is that OSHA can learn how to shift some burdens onto other groups so that the Agency can accomplish more with the same resources. Successful shifts that OSHA is now employing include the citation of the IARC Monographs and the DHHS Annual Report on Carcinogens as authoritative sources for employers to use in determining if their products contain carcinogens. This action and some of its consequences have led the Interagency for Research in Cancer to look more carefully at its information. The PEL project will have an even greater effect on the American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Value (TLV) Committee. If employers and employees believe that OSHA may promulgate a standard based on the ACGIH's actions, they will scrutinize the ACGIH more carefully, and better TLVs should result.

The Environmental Protection Agency, with a much larger budget than OSHA, has piggy-backed onto OSHA by using referrals under the Toxic Substances Control Act and by referencing OSHA's Hazard Communication Standard to implement community right-to-know provisions under the Superfund Reauthorization Act. OSHA needs to learn how to tap into other Agencies' resources. For example, agressive participation in the National Toxicology Program and the Interagency Test Committee would assure that chemicals of high priority to occupational health are tested for toxicity. OSHA also needs to establish an image with employers that will promote voluntary compliance with the OSH Act.

STRATEGIES FOR A NEW OSHA

Changes I would make in OSHA's approach focus on three areas: enforcement, standards development, and community outreach.

A. Enforcement

I would make three changes affecting enforcement of existing standards; these changes involve inspections, voluntary compliance programs, and improved communication within the Agency to guarantee that a uniform posture is maintained to the regulated community. Intuition tells me that I would want to examine the effectiveness of state plans; I am not prepared at this time to comment on changes that might be needed in this area.

To improve the quality of inspections, I would increase by roughly 50% the number of OSHA inspectors in the field. OSHA's Salt Lake City Lab would also need additional chemists to analyze the increased number of samples being collected.

In the Senate Labor Committee hearings, there was heated debate as to whether OSHA has 700 or 1,000 inspectors. Clearly, neither figure is adequate to monitor all of the worksites under OSHA's jurisdiction. Even if these figures were doubled, which would strain other OSHA programs and the pool of available industrial hygienists and safety inspectors, the chances of an individual plant being inspected would remain low. Consequently, I would use the additional manpower to increase the quality, rather than the number, of inspections.

To guarantee that unsafe places actually abate identified hazards, all places where a serious or willful citation was issued would be reinspected. Other facilities under the same corporate program would also be targeted. Unfortunately, OSHA has found through bitter experience that the word of some companies that a hazard will be abated does not carry much weight. A tragic example of how some companies disregard compliance agreements they have negotiated with OSHA was described in a February 11, 1988, news release prepared by OSHA's Office of Information. Proposed penalties against this company were $2.78 million for 313 alleged job safety and health violations. Of 177 alleged health violations, OSHA described 147 as willful. There were also 136 alleged recordkeeping violations. Examples such as this show the absolute necessity of followup once a problem has been identified.

Perhaps the worst policy ever thrust upon employers and employees alike was OSHA's pronouncement that inspectors would not conduct a general inspection if an employer's records indicated illness and injury rates below national averages. One has to suspect that the hidden intent of this policy was to artificially reduce national rates. Carried over a long enough time, rates should drop to zero as corporations hid more and more injuries and illnesses to keep below dropping rates! Not unexpectedly, recent record-setting fines have focused on recordkeeping violations. What did the administration expect when it set out on this course? Most company industrial hygienists are basically honest persons, and they are OSHA's first line of defense to assure that the intent of the OSH Act is met. They are humans, however, and they must answer to other humans whose motive is profit, not industrial hygiene. OSHA has no business playing the devil by sending a message that whispers in these persons' ears, cheat, cheat, cheat. I would revoke all remnants of this ill-founded policy immediately.

An effective policy permitting companies to exempt themselves from OSHA inspections can be achieved, however, and such a policy is in OSHA's best interest. Several other countries emphasize the role of worker-management committees in providing safe and healthful workplaces. Weirton Steel and Ford Motor Company have proven in other arenas that managers and production line employees in the United States can work together to achieve a common goal. Few workers are unionized, however, so that most workers and managers are not starting off in a safety and health committee from equal positions of strength. Management generally has greater formal education, and production employees do not have the background to be able to assure themselves that information they are receiving about toxic chemicals and physical hazards is accurate. OSHA cannot rely solely on worker-manager health and safety committees to certify exemption.

To increase OSHA's confidence that worker-manager health and safety committees are functioning as intended, I would further require that key members on the committee take a minimum number of OSHA or NIOSH-sponsored courses in occupational safety and health. To a company to remain exempt from general inspections, continuing education would also be necessary. Each plant, to be certified, would also have to agree to train workers periodically on the hazards of the materials they handle. Training materials would have to be made available to OSHA upon request as a check to assure that hazards are accurately portrayed. Since the Hazard Communication Standard requires one-time training, this would greatly enhance the workers' knowledge of job hazards. OSHA's budget permitting, I would also require these companies to submit to inspection by an OSHA-approved industrial hygiene consultant with abatement of any serious violations found.

There must be nothing more frustrating to an employer than getting two conflicting interpretations of a standard from members of the same Agency, and yet I am sure that this sometimes happens. It is also frustrating to scientists to see a standard enforced in a manner differing from the intent of the writer. To guarantee that enforcement of standards is uniform and that standards, when they are promulgated, are easily enforced, I would encourage interaction between OSHA and state-maintained occupational safety and health programs programs through a Program that permits personnel to exchange jobs for periods averaging a year. I would also encourage rotation of employees within the national program; at the staff level, persons assigned to a standard would be encouraged to accompany actual inspections of facilities potentially affected as an observer. Regional and Area managers would be given cash incentives to encourage them to rotate throughout the program in a manner similar to that employed by some large corporations, such as IBM. Other ways to improve communications among OSHA staff would be: (a) to routinely bring in programs taught at the OSHA Training Institute and make them available to the entire professional staff in the national office, and (b) to have the scientists from Health Standards Programs go to the regional offices to present information to the field when a new standard is promulgated.

B. Standards Development

Several changes in this area would assure that the small staff available is used most effectively. For example, I would examine methods that could be implemented to obtain more accurate collection of data on occupational illness and injuries. Present reporting methods are useless for establishing information on mortality from chronic hazards, on morbidity, and on losses of productivity. Potential sources of information are the Bureau of Labor Statistics and NIOSH. If the information cannot be collected through Interagency Agreements, I would explore alternatives such as contracted studies.

I would also actively seek through any means necessary to minimize extraneous, nonproductive influences that have slowed down regulation without contributing meaningfully to the production of a better, more efficient, and more enforceable standard. My primary example of a group that is not doing its job is OMB. Presumably, this group is concerned that regulations are cost-effective. However, through its own review process, OSHA was able to slash the costs of the Formaldehyde Standard from an annual figure of $138 million to $64.3 million while at the same time enhancing the effectiveness of the standard. OMB made the standard more difficult for OSHA to enforce, and actions taken under the Paperwork Reduction Act sent a misleading message to the regulated community. The cost saving each year was estimated to be $100,000. This group of economists and policy makers has also tampered with NIOSH survey forms for epidemiology studies, raising my concerns that the integrity of NIOSH's studies may have been compromised.

I fully support the efforts of Mr. Pendergrass to update OSHA's existing permissible exposure limits (PELs). If there is one big flaw in the OSH Act, it is the failure to give OSHA the ability to expeditiously keep up with the rest of the occupational health community once the one-time-only chance offered in the first two years of the Agency's existence passed. Because the PEL project will have to go through the tortuous path of all 6(b) rules and because of the size of this project, I believe that years will pass before the project is ever completed. If this worthy project is not to die, it will have to be carried on in the next administration.

Once OSHA's existing PELs are updated, establishing a precedent for such action, the Agency should routinely consider proposing changes in PELs and in safety standards when consensus groups alter their recommendations. ALthough such standards would be limited in nature and hence not ideal, the time OSHA would need to complete them as compared to a complete 6(b) rule started from scratch justifies this approach. This approach would still give trade associations, unions, employers, and employees an opportunity to comment on the change before it becomes a final rule.

I would establish a set of criteria for determining the actions to take when the Agency is examining the possibility of regulating a toxic chemical. This approach is necessary to prevent delays in answering petitioners who have requested that OSHA develop a new rule. For example, the wood dust petitioners have waited three years for a reply from OSHA, and staff personnel have committed large amounts of time to the project. By now, a proposal could have been issued; instead the project languishes. Specific criteria that take into account the number of workers who would benefit, the seriousness of the hazard, and whether or not the industries affected are already covered by other complete 6(b) rules would be applied to determine if a 6(b) rule is warranted. If it is not, but a hazard exists, the possibility of a less time consuming approach, including promulgation of a permissible exposure limit, OSHA endorsement of an existing consensus standard as a proposed rule, or guidelines possibly backed up by 5(a)(1) citations would be explored. If a hazard meets the criteria for a 6(b) rule, the possibilities would be examined that an Emergency Temporary Standard should be issued or that expedited rulemaking should be undertaken even though this bumps existing projects already in the queue. The entire process should take no more than 3 to 6 months before a reply is made to the petitioner.

The key to the success of this approach is that OSHA could assure the petitioner of the exact action contemplated and the timetable needed before action is begun. This would eliminate what appears to be extreme footdragging when the Agency is already busy and does not want to drop an existing project even though the petition is clearly of some merit.

I would continue to do a number of complete standards through 6(b) rulemaking. The criteria for selecting chemicals would include recognition of the seriousness of the hazard. However, great weight would be given to developing a complete rule for hazards that are especially difficult to abate (eg. if a chemical causes dermal sensitization or penetrates the skin, a PEL alone will not protect workers). Priority would also be given to those industries not presently affected by a complete standard. Complete standards give OSHA a strong hand when negotiating with employers about abatement of hazards. A few complete standards, carefully sprinkled about, helps OSHA to overcome difficulties presented by antiquated dollar amounts assigned in the OSH Act for fines when an inspection reveals noncompliance with an OSHA standard. For example, the life of a worker most often ends up costing a negligent employer about $600, not nearly enough to ensure that an employer will take an active role in making sure his or her workplace was safe to begin with.

Finally, I would establish a management hierarchy that places as many project personnel as possible under as low a management structure as possible. This action is necessary because the present structure leaves OSHA staff responsible to project officers and to managers in the traditional hierarchy. The needs of these two persons often conflict, leaving the staff member in the middle between a project that needs to be done and a manager who has a different agenda and the power of the performance appraisal. This structure leads to missed deadlines and delays in completion of standards.

C. Outreach

The final area where I would make major changes in OSHA's activities involves the Agency's need to make effective use of the media to project a better image to the regulated community.

The vast majority of employers do not set out to physically harm their employees or to damage their health. However, companies exist to make a profit, and OSHA tends to be seen by corporate management as an aggravation that diminishes profits without providing anything useful in return. Worse yet, this image gets projected to employees. (Witness, for example, jokes about the OSHA cowboy with a porta-potty tied to his horse or cartoons carried in a leading comic strip about the OSHA-approved football). Soon, employees begin to view their right to a safe and healthful workplace as one of a number of fringe benefits, along with vacation time, maternity leave, and medical insurance, and they adopt an attitude that it is acceptable to negotiate for their lives.

At a Navy facility I visited a number of years ago, workers employed in areas where OSHA PELs were exceeded received hazard duty pay. When new controls were installed to decrease airborne concentrations, the workers lost their pay differential. According to the industrial hygienist at the plant, instead of being grateful that the hazardous situation was abated, many workers preferred the higher pay.

From repeated conversations with employers and occupational physicians working at plants, I have become aware that most genuinely do not recognize if a chemical exposure presents a significant risk to their employees. The Supreme Court stated that exposures that resulting in the deaths of 1 in a thousand workers clearly represent a significant risk to employees . The OSHA Act indicates that protection must extend for up to a working lifetime, approximately 45 years. The average plant contains about 200 workers, and even large corporations may expose only a few thousand production workers to toxic chemicals. The typical worker that the employer or the physician sees is young and robust. They do not see the retired person who has developed emphysema or cancer. Thus, they honestly believe that there are no problems and that they are adequately protecting their workers, whether they are or not.

For OSHA to change these attitudes, the Agency must become more aggressive in its attempts to reach out to employers and employees. This is especially critical for small companies who otherwise will probably never have any contact with OSHA. The Agency needs to provide incentives to get these employers to come to OSHA for help. To do this, OSHA should reestablish and strengthen its former program to provide free on-site industrial hygiene consultation to small businesses. This should be expanded to include exposure monitoring. The only requirement would be that the employer must agree to abate any hazards found; assistance in design of necessary engineering controls would be given.

OSHA should maintain full service area offices even though this takes away time from conducting inspections. Employers would be able to obtain videotapes concerning abatement of health and safety hazards and training materials to help them comply with the Hazard Communication Standard through the area offices. The employer would be able to borrow or purchase these materials to show and distribute to workers at his or her plant. To the extent that staff is available, OSHA should also agree to speak to employers and employees on topics relating to their health and safety in the workplace. To be sure that employers and employees are aware of these services, OSHA should advertise them in appropriate trade magazines and journals.

SUMMARY

I believe that the approach I have outlined, indicating small changes in enforcement and standards development and a major change in OSHA's visibility to the regulated community would provide the greatest improvement in occupational safety and health at the least additional cost. However, I must emphasize that to implement this program, some growth on the part of the Agency in both personnel and funds is presumed.

Unless this nation is prepared to invest vast amounts of money to encourage many more graduate students to seek a career in occupational safety and health and to employ them to set up a Federal dragnet that will guarantee that all American workplaces are routinely inspected every few years, then everyone must become involved. Nearly all American citizens are employers or employees, retired, or the spouse or children of someone employed in the workplace. A safe and healthful workplace is simply good business -- it should be the responsibility of every employee and employer to guarantee that this atmosphere is maintained.

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

RESPONSE TO SENATOR SIMON'S QUESTION REGARDING ACTIONS TO PROTECT WORKERS MORE EFFECTIVELY

PREPARED BY JOHN F. MARTONIK

During the Senate OSHA Oversight Hearing conducted on April 18, 1988, Senator Simon asked each person on the OSHA scientist panel to prepare a written description of actions that each person would take to protect workers more effectively if he or she were to become the head of OSHA. These pages contain my response to Senator Simon's request. My response is primarily focused on the promulgation of health standards, and only contains my thoughts concerning other important aspects of OSHA's programs, such as enforcement issues, to a limited extent. In addition, my comments are limited to practical changes that could be made to the Agency, and to changes that can be made relatively quickly.

First, the ongoing deregulatory efforts should be stopped. Substantive information does not exist to justify continuing work on deregulatory projects including methods of compliance, access to records, noise and hearing conservation, hazard communication, and cancer policy.

The Office of Regulatory Analysis which is now a part of the OSHA's Directorate of Policy, should be reorganized into OSHA's Directorate of Health Standards Programs and Directorate of

Safety Standards Programs. The Office of Regulatory Analysis gathers and interprets worker exposure information, control technology information and cost information for alternative provisions for safety and health standards. This information is vital to standard promulgation process but the Standards' Directorates have minimal ability to interact with these Policy economists. The Senior Executive Service manager who claims responsibility for the locating the Office of Regulatory Analysis in the Directorate of Policy, and keeping the Office out of the Standards' Directorates, has justified his action by stating that he wants to "separate the dollar sign from the science." However, this poor justification does not comport with the facts of the situation. Economists are not equipped to develop risk reduction strategies nor are economists knowledgeable concerning costs for engineering changes. Furthermore, a more efficient working relationship between the Office of Regulatory Analysis and the Standards' Directorates would occur if they worked together.

OSHA could easily justify increasing staff size by a factor a ten; however, assuming that a such large increase could not be obtained, there are several offices in the National structure that are now understaffed that could become much more effective with moderate increases. An additional twenty to thirty positions should immediately be allocated to the Directorate of Health Standards Programs, twenty positions should be allocated to the Offices of Health Compliance Assistance and the Office of Safety Compliance Assistance, and to the extent compatible with budget policy, any additional positions that can be acquired should be allocated for inspections.

OSHA should take an active role in improving communications between professionals in the various public health disciplines, workers, companies and other government agencies. OSHA should take the lead in occupational safety and health issues.

There are many issues and health policies that should be developed. These include how to regulate reproductive and neurotoxic hazards and instituting a health standards priortization system. At this time, OSHA is reactionary, and has no vision. A program should be developed to deal with new issues. Improved communications described in the paragraph above should help in achieving this goal.

Many "Catch-22" instructions for administrative functions prevent practically all but Court ordered regulatory actions from being published. The Assistant Secretary for OSHA needs to clarify and streamline review process within the Department of Labor and between the Department and OMB. The head of OSHA needs to meet with the Secretary of Labor to eliminate needless procedures and to restrict the ability of the different Department of Labor offices (such as the Office of the Solicitor, the Office of the Assistant Secretary for Management, and the Secretary's Policy Office) from instituting counterproductive procedures in the future. In addition, OSHA should only follow procedures that are in writing and are signed by a person of authority; this will prevent the sponataneously made-up reasons for delaying document processing that now occurs.

I believe that the above changes can be made simply and quickly and will have great value in improving the health standards promulgation process. These would be some of the first things that I would do if I became the head of OSHA. I am not able to describe my recommendations for policy changes within the time given to complete this assignment.

Response to Senator Simon's Request During OSHA Oversight Hearing, 4/19/88

Jennifer Silk

Before I would accept the position of Assistant Secretary for Occupational Safety and Health, I would have to have the assurance of the Secretary of Labor that I would have the authority to carry out the responsibilities mandated by the Occupational Safety and Health Act. The protection of employees to the extent feasible would always have to be the overriding concern in establishing and implementing Agency policy. If there is a disagreement within the Department of Labor concerning the policy, the Assistant Secretary must be able to present the case directly to the Secretary for decision. The unique scientific and technical expertise of the Agency must be given precedence in these situations. Furthermore, the Department must be prepared to support OSHA and its actions if there are disagreements with other agencies, particularly the Office of Management and Budget.

Having received such assurances, there are a number of areas where improvements could be made. It is not possible to address these very specifically in this short discussion, but I will indicate some general areas of concern. In the most simplistic terms, OSHA's primary problem is that it has never been able to progress from operating in a reactive, crisis-oriented mode. As the Agency has never been given the resources necessary to properly implement the Act, its agenda and activities are set in response to pressures exerted by interested and affected parties. OSHA will always have crises to deal with, but we must reach a point where management of such crises does not utilize all available resources.

Budget and Staff

Clearly OSHA does not have a budget or staff of sufficient size to accomplish its assigned tasks. A quick comparison of OSHA's resources to those of a number of the regulatory programs in the Environmental Protection Agency, for example, will reveal large discrepancies in the extent of funding and staffing for programs that often deal with similar issues. The most dire needs are in the field. More money and positions are needed to adequately monitor compliance, and to fund the State Plan States to do the same. It would be helpful to be able to open more field offices. The geographical areas now covered by some area offices are so widespread that a significant amount of time for the compliance staff must be spent traveling. More money should also be allocated to providing free consultation services, particularly to small employers.

Any new hiring in either the field or the national office needs to focus on entry level positions. Due to the lack of hiring in recent years, OSHA's staff has gradually aged and progressed to more senior positions. For the long term viability of the Agency, more emphasis needs to be placed on hiring recent college graduates and providing them with on-the-job training and opportunity for advancement to ensure that experienced people will continue to be available to manage the Agency in the future.

We also need more funding to upgrade the technical capabilities of the Agency, particularly in providing computer resources and other equipment to our offices. In Health Standards, for example, every professional should have a computer terminal. Much work has been done in this area, but it needs to be more extensive and completed more expeditiously.

Management Issues

More effort needs to be made to identify long-term strategies and plan for the future. One resource that has not been adequately used in this regard is the OSHA staff itself. For example, in the area of Health Standards, our priorities in recent years have been set as a result of court actions, petitions, and other outside pressures. The Agency should have some systematic approach to gather input from the field regarding standards that are needed. The compliance officers should identify hazardous chemicals and situations for which there are no specific standards to cite, and provide this information to the national office for priority-setting.

In general, there needs to be more interaction between the national office staff and the field. There has been some effort to bring field staff into the national office for various projects, and this has been helpful. The national office staff must be provided similar opportunities to be detailed to the field. This will promote a better understanding of our respective problems and needs.

Some reorganization would also be in order to improve efficiency. For example, responsibility for regulatory impact analyses should be included in the standards' directorates, rather than in the policy directorate. The heads of the standards' directorates would then have control over the process, and would ensure that there are no conflicting priorities for completion of the required projects.

It would also be helpful to encourage the Department to reorganize the Solicitor's Office so that the attorneys are assigned to the Agency rather than being a separate agency within the Department. This would give the Agency control over the priorities of the attorneys, and would help eliminate the current situation where attorneys are setting OSHA policy through various avenues. For example, standards may be dealt with by three different parts of the Solicitor's Office--the standards and litigation attorneys in the OSH Division, the appellate attorneys, and the OMB liaison. These different offices do not always agree with each other, much less the Agency, and the Agency's needs and desires often do not prevail in this situation.

Outreach Efforts

OSHA must be more active in a number of forums to ensure its message is heard, and that it has an impact on the development of policies and issues related to occupational safety and health.

A more formal interaction between OSHA and other regulatory agencies should be established. EPA, DOT, CPSC, and FDA, for example, all have activities that are related to OSHA.

OSHA should be more active in international forums. This would allow the Agency to help countries less developed in this area, and to learn from countries that are also active in the safety and health arena.

Preparation and distribution of publications and audiovisual materials should be a higher priority for the Agency. OSHA should devote more effort to educating and training the regulated community, thus assuring a higher degree of voluntary compliance. Participation by OSHA staff in seminars and training sessions sponsored by unions, trade associations and professional societies should be more frequent, both as a learning experience for the Agency and for the other participants. Establishing personal rapport with the regulated community and with workers will facilitate accomplishment of our mission.

Legislative Agenda

There are always advantages and disadvantages to amending a statute, and certainly that is true for the OSH Act. However, if there were to be such an effort, there are several areas that should be considered.

Although it would be a radical departure from the current situation, it appears that making OSHA an independent regulatory agency might be advantageous. It would highlight the purpose of the Agency, separate its funding concerns from those of other unrelated areas, and eliminate the current extensive decisionmaking hierarchy.

The provisions regarding interaction with other Federal agency rules (section 4(b)(1) need to be revised. The language is too general to provide sufficient guidance, and employees in some areas are not being protected sufficiently due to presumed 4(b)(1) preemption. It should be made clear that OSHA has jurisdiction in this area.

It should also be made clear in either the OSH Act or the Paperwork Reduction Act that activities such as providing medical surveillance to employees, preparing training programs, etc. should not be considered to be information collection burdens. Where OSHA requires specific recordkeeping or submission of forms such burdens will be assessed, but other substantive provisions will not be counted.

Although the agriculture industry has long been recognized as being hazardous, Congress has included a rider on OSHA's appropriations bill for many years that precludes the Agency from promulgating or enforcing standards for farms with ten or fewer workers. This rider should be removed to afford agricultural workers equal protection under the law.

RESPONSE BY DR. SHELDON WEINER TO REQUEST FROM SENATOR SIMON REGARDING SUGGESTIONS FOR OSHA MANAGEMENT

OSHA is a complex, if small, agency and responding to a blanket request to state what one would do as Assistant Secretary could not provide other than obvious or superficial comments in the time provided. Therefore, I prefer to confine my comments to the basic issue of rulemaking decisions as addressed in the hearing.. Even in this narrow context, to ask what one would do if he or she were Assistant Secretary of OSHA begs the question. First of all, the Assistant Secretary of OSHA, under the present system does not control the major policy decisions. They are made under extreme pressure from the Assistant Secretary for Policy (ASP) and from OMB. So, aside from changes in organizational structure and the formulation of internal policies, the Assistant Secretary often does not have the final word with respect to major rulemaking policy issues.

The question is, apart from whether the key player is the Assistant Secretary or not, how should the Agency make its action decisions? On what basis should such decisions be made? To what extent should political policy dictate rulemaking activity? How should the Agency decide what issues to act on?

Who should have the final say on what a regulatory action should consist of, and what criteria should determine the decision? How can the process be made less cumbersome? And finally, how can the integrity of the process be preserved so that everyone understands, whether they agree with the final outcome or not, that it was a fair process?

All of the above questions are irrelevant as long as another agency, OMB, calls the shots. The first step in making OSHA more effective, more efficient and more honest is to confine OMB authority to a very limited area relating to specific economic issues which are well-defined and to re-establish the focus of the Paperwork Reduction Act so it cannot be used to attack regulatory provisions which have nothing to do with paperwork. Restricting OMB in this manner cannot be done by OSHA. It can only be done by the White House or by congressional action. Therefore, in this regard, the effectiveness of the Agency is not in its own hands. To the extent that OMB is to continue to have impact on OSHA decisions, all OMB actions relative to a particular project should be subject to public comment as are the OSHA recommendations. It therefore should be required, by congressional mandate if necessary, that OMB be compelled to identify its recommendations as OMB recommendations during the rulemaking to distinguish them from those of OSHA. Where OMB compels OSHA to take action in opposition to the OSHA position, that fact should be made public. OMB policy should not be a determining factor subject to neither appeal nor public scrutiny.

Most of the questions posed earlier regarding the Agency itself would be forced to a resolution if it were required by executive order or congressional action that, in every rulemaking activity, the OSHA staff recommendations be made known in the preamble of the document. The policy arguments should then be made separately, and to the extent that policy overrides staff recommendations, the reasons for the overriding policy should be stated -- openly for public comment. Rulemaking documents should not be written so that policy decisions can be made to appear as if they were staff recommendations. It should not be possible for rulemaking decisions, which are supposed to be arrived at by open public process, to be made in private negotiations with OMB.

With an acknowledged emphasis on carrying out the mandate of the OSH Act, specific actions regarding internal organization, staffing, compliance direction etc. can be easily established. With the above stated suggestions in place, there would be no impetus for committee hearings such as the one just held, at least with regard to standards development. Unfortunately, the recently-completed committee hearing did little to solve the current problems because it devoted the crucial last day of the hearing to accusations and polemics rather than an exploration of how the system works and what specific measures could be taken to correct the present imbalances. In short, it is not clear that anybody, including congress, has made a sincere commitment to address the real issues and until someone does, nothing will change.

The **Chairman**. Senator Metzenbaum.

Senator **Metzenbaum**. Dr. Rodgers, Dr. Infante, and Mr. Martonik, tell me, what happens to you when you are trying to move down a road, you have given a lot of your life to this agency, and then OMB comes and slaps you down and says you can't go forward. What happens to you as a professional in the agency?

Dr. **Rodgers**. Working for OSHA is almost professional suicide. When you cannot get anything out for so long, you have a bad rep on the outside, like what's going on. And particularly in the proposal, where we had to put some very egregious things in that ignored cancer altogether, I had people call me from the outside and ask, "What has happened to your brain?" It is a very frustrating situation to have to take the fall for that.

Senator **Metzenbaum**. Dr. Infante.

Dr. **Infante**. Well, yes, it is extremely frustrating. There are so many occupational health hazards that we have not dealt with yet today, that when we finally choose to deal with a hazard, there is tremendous information on that hazard. And then you go through and you do a lengthy evaluation, and at the end of gathering information, analysis, re-analysis and further re-analysis, if nothing comes from it, or if less than what you had hoped for comes from it, that is extremely frustrating, and you ask yourself the question why are you doing this.

Senator **Metzenbaum**. Ms. Silk, what happens to you as a professional?

Ms. **Silk**. I think I would agree with what both Dr. Rodgers and Dr. Infante said, that it is very frustrating and we have very limited resources to deal with many hazards. For example, on Hazard Communication, having to stand seven years to complete a rulemaking—resources are being diverted from addressing other things.

Senator **Metzenbaum**. Does it sort of destroy your will to do the job that you have been hired to do?

Ms. **Silk**. I have always said you have to have strong masochistic tendencies to stay in health standards as long as most of us have, because it is very frustrating. You have to fight constantly just to get out the things that you are supposed to be doing.

Senator **Metzenbaum**. Dr. Harwood.

Dr. **Harwood**. It is very frustrating, Senator, but I think the thing that keeps me awake at night is the idea of people dying unnecessarily because OSHA is delaying, or OMB has taken something out, or something like that. That is what I find most difficult to deal with.

Senator **Metzenbaum**. Mr. Martonik?

Mr. **Martonik**. Well, one thing that keeps you going as well is sometimes the comments we get from the economists at OMB are so ridiculous that they actually become funny. It is hard dealing with those issues on one hand, but on the other hand, just recognizing what you are dealing with makes it easier. An example is that Dr. Infante and Dr. Rodgers and I met with two economists from OMB and discussed the health hazards of formaldehyde with them, and they adamantly argued with us about the toxicity of formaldehyde. Dr. Infante had to give them an epidemiology lesson, and Dr.

Rodgers had to give them a toxicology lesson, and I had to describe how to do risk assessments for them.

But you just grind away at it, and we move forward to some extent.

Senator METZENBAUM. Well, as depressing as it is to see the frustrations that you have, it is refreshing to learn of your own personal dedication, and I for one thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Metzenbaum.

Mr. Scully, what is your position at OSHA?

Mr. SCULLY. I am an occupational safety and health specialist.

The CHAIRMAN. How long have you been working on safety standards?

Mr. SCULLY. Twelve years.

The CHAIRMAN. And are you the project officer for the lockout/tagout safety standard?

Mr. SCULLY. I am.

The CHAIRMAN. And the terms "lockout" and "tagout" refer to locking or tagging equipment that is being worked on by someone so that another person does not inadvertently activate the equipment; is that right?

Mr. SCULLY. That's true.

The CHAIRMAN. And does OSHA estimate that 150 fatalities occur each year because of inadequate lockout procedures?

Mr. SCULLY. That's correct.

The CHAIRMAN. And are there 28,000 lost workdays each year because of the injuries resulting from inadequate lockout?

Mr. SCULLY. Yes, there are.

The CHAIRMAN. Did OSHA first begin working on the lockout standard in 1977 by publishing a request for information?

Mr. SCULLY. Yes, we did.

The CHAIRMAN. So the agency has been working on a lockout standard for 11 years. Maybe we should go through some of the things that have happened in the meantime.

Was the agency petitioned by the United Auto Workers in 1979 for an emergency temporary standard?

Mr. SCULLY. That's true.

The CHAIRMAN. Did the agency deny that petition and instead issue an Advanced Notice of Proposed Rulemaking and hold public meetings on a possible standard eight years ago?

Mr. SCULLY. That's true.

The CHAIRMAN. So things were moving along.

Mr. SCULLY. Kind of slow.

The CHAIRMAN. When the change of Administration occurred, were you told not to work on the standard anymore and to work on deregulatory proposals instead?

Mr. SCULLY. I was given another assignment in another area of the standards.

The CHAIRMAN. And did you stop working on the standard?

Mr. SCULLY. Directly, yes; indirectly, no. We were still developing background information and statistical information to be used at a later date.

The CHAIRMAN. But you had other responsibilities.

Mr. SCULLY. Yes.

The CHAIRMAN. And in 1982, was the agency again petitioned for an emergency temporary standard by the Allied Industrial Workers, and did OSHA deny the petition again?

Mr. SCULLY. That's true.

The CHAIRMAN. And in denying the petition six years ago, did OSHA promise to develop a standard as soon as possible?

Mr. SCULLY. Yes.

The CHAIRMAN. And did you proceed to write it?

Mr. SCULLY. I did.

The CHAIRMAN. And when you were writing the draft, did the Director of Safety Standards, Barry White, direct you to limit the scope of the standard to certain industries where the most lockout accidents occur, even though you thought it should cover all industries?

Mr. SCULLY. Actually, the direction came from my immediate supervisor, who was the Director of Mechanical Engineering Safety Standards, Carol Burtner.

The CHAIRMAN. All right. Well, did you change the standard?

Mr. SCULLY. I did.

The CHAIRMAN. And did you subsequently prepare a proposal which was ready in 1984 that had a limited scope, and did you forward it to the Solicitor's Office for their review?

Mr. SCULLY. That's true.

The CHAIRMAN. And the Solicitor's Office spent two years reviewing the proposal, which required OSHA to come up with four different drafts of it; is that correct?

Mr. SCULLY. That is true.

The CHAIRMAN. And was the Solicitor's Office mainly concerned that the scope of the standard should be broad, to cover all industries, just as you had drafted the pre-proposal before Barry White, was it, directed you to change it?

Mr. SCULLY. Yes. The project attorney was insistent that the standard be broader in scope than it was originally designed for.

The CHAIRMAN. And did the union subsequently write to OSHA in 1986 to inquire about the status of the proposal?

Mr. SCULLY. Yes, they did.

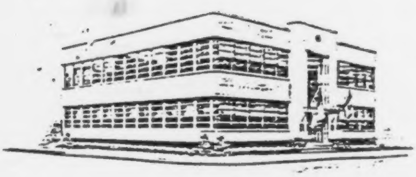
The CHAIRMAN. And I have a copy of one of the letters, and it states: "It has been seven years since UAW first requested a lockout standard, and their list of fatally-injured workers continues to grow. A draft has been written and commented on, but has yet to see the light of day. How many more workers must die before an effective lockout standard is promulgated? OSHA has recently published a regulatory agenda which includes a lockout standard. Will action finally be taken?"

Did Assistant Secretary Pendergrass send a reply?

Mr. SCULLY. I believe that was replied to.

The CHAIRMAN. I have a copy of that reply. "The draft is now undergoing internal review and is expected to be published for public comment the first part of 1987.

[The letters referred to follows:]



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AFFILIATE OF A.F.L.-C.I.O.-C.L.C.

**INTERNATIONAL
MOLDERS AND ALLIED WORKERS UNION**

1225 EAST McMILLAN STREET
CINCINNATI, OHIO 45206

July 10, 1986

Secretary William E. Brock, III
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Secretary Brock,

We would like to bring to your attention some recent events related to computer operated equipment. On July 21, 1984, a United Automobile Workers member in Michigan was killed after being pinned between an industrial robot and a safety pole. On April 11, 1985, a Molders Union member in Ohio was killed when the linkage between an industrial computer and a hydraulic elevator was accidently activated. These events share a common factor in the use of modern electronic technology in the workplace. We believe that if well established principals of occupational safety had been followed, these fatalities would not have occurred. In these two instances, adequate machine guarding and an effective lockout procedure were not in place at the time of the accidents. There is presently no lockout standard.

With the rapid proliferation of robots, microchips and computers in industry, these events may be an indication of a growing trend in occupational health and safety. In order to fully evaluate this potential problem, we believe that three actions are called for.

> NIOSH has listed traumatic deaths as one of the ten leading work-related diseases and injuries. This agency should investigate computer related injuries and fatalities to determine their nature and severity. They should play a leading role in investigating the extent of this situation. One of NIOSHs goals for 1990 is for firms to reduce occupational risk factors by having an approved plan of hazard control for all new equipment. An investigation in this area can play a critical role in developing appropriate control plans.

INTERNATIONAL
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Page Two
Secretary Brock

Secondly, an initial list from the UAW alone lists 53 deaths since 1974 related to the lack of an effective lockout procedure. An effective lockout standard would de-energize machinery during maintenance or mechanically prevent inadvertant activation. It has been 7 years since the UAW first requested a lockout standard and their list of fatally injured workers continues to grow. A draft has been written and commented on but has yet to see the light of day. How many more workers must die before an effective lockout standard is promulgated? OSHA has recently published a regulatory agenda which includes a lockout standard. Will action finally be taken?

Lastly, a thorough evaluation of all electronic equipment is necessary before it is introduced into the workplace. Maintenance workers will have to enter a mechanized workplace and face safety hazards and chemical exposures that only machines are regularly exposed to. These hazards must be evaluated and corrected before any more workers are harmed. The use of computerized equipment does not eliminate the need for its evaluation by safe standards of operation. By far the easiest method to accomplish this task is at the design stage of the modern workplace. Engineering schools must emphasize the teaching of occupational safety and health. This is consistent with NIOSHs 1990 objective of having 70% of all graduate engineers skilled in occupational safety and health control technologies. Specifically, Educational Resource Centers should be required to include an evaluation of computer operated equipment as part of their program activity.

We would appreciate your response to our concerns.

cc:
Secretary Bowen
Dr. J. D. Millar
Mr. J. Pendergrass

Bernard Butsavage
President
International Molders
and Allied Workers Union

International Chemical
Workers

Robert Willis, President
American Federation of
Grain Millers

International Association
of Machinists and Aerospace
Workers

Industrial Union Department
AFL-CIO

United Automobile Workers

International Union of
Electronic and Electrical
Workers

Allied Industrial Workers

United Rubber Workers

United Steelworkers of America

Department of Occupational Safety,
Health, and Social Security, AFL-CIO

OCT 1 4 1986

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

OCT 8 1986

Mr. Bernard Butsavage
President
International Molders and
  Allied Workers Union
1225 East McMillan Street
Cincinnati, Ohio 45206

Dear Mr. Butsavage:

Secretary of Labor William E. Brock has asked me to respond to your two letters dated September 17, in which you informed the Occupational Safety and Health Administration (OSHA) of two recent fatalities involving members of your organization, and expressed the conviction that promulgation of a lockout standard would avoid such instances.

OSHA recognizes the urgency of addressing control measures that are necessary to prevent injury to employees when they are engaged in maintenance, repair, and service-related activities in the workplace. The Directorate of Safety Standards Programs has been giving top priority to completing a draft proposal for publication in the Federal Register. The draft is now undergoing internal review and is expected to be published for public comment in the first part of 1987.

We would like to assure you that OSHA is moving at the fastest possible speed to publish a lockout proposal which will properly address the scope and complexity of the problems involved. Thank you for writing to us on the subject.

Sincerely,

John A. Pendergrass
Assistant Secretary

The CHAIRMAN. Did the Solicitor's Office subsequently insist on the broad scope, and did OSHA broaden the scope and forward the standard to Policy Review in 1987?

Mr. SCULLY. The project attorney did insist on a broader scope. We did make changes to the standard, which also meant changes to the regulatory impact analysis, and the PRIA. That is true.

The CHAIRMAN. And did the Policy Review try to narrow the scope of the standard after the Solicitor's Office had just made you broaden it?

Mr. SCULLY. Yes. They expressed their desire to limit the scope to sic code application in order to narrow the scope, in effect.

The CHAIRMAN. And did the PRB finally approve the standard, but ask you to update the data on the standard because it was now so old?

Mr. SCULLY. That is true.

The CHAIRMAN. So it took three years from the time you drafted a proposal until the Department completed its internal review, and by OSHA's estimate, 450 workers were killed in lockout actions while the Department was arguing over the scope of the standard; is that right?

Mr. SCULLY. That's true.

The CHAIRMAN. Did you forward the proposal to OMB for approval in May of 1987?

Mr. SCULLY. Yes, we did.

The CHAIRMAN. And did OMB sit on the proposal for three months?

Mr. SCULLY. Yes, they did. In 90 days, they sent us a letter saying that they needed additional time to study the standard.

The CHAIRMAN. Did you finally meet with OMB to discuss the proposal?

Mr. SCULLY. We met in August.

The CHAIRMAN. I have a copy of the notes from the meeting, and the notes say, "analytical basis, weakest; scope, fuzzy." What is the bottom line? Do you want to kill the standard? I haven't seen all the data.

[Information supplied follows:]

Lockout Mtg. 8/27/87
Ø

- Scott Jacobs
- Diana ___?___

analytical basis - "weakest"
ERG report - tenuous

Scope - "Fuzzy"

p117 - (c) "Normal operating activity" -
emphasize "unexpected" nature of the energy

☆ need to look at this
— where either energized or ~~no~~ unexpected energization
— not to be covered —

— questions re data -
individual machines concern -
machine-specific risk determination

BW - "whats the bottom line? Do you want to kill the std"
Scott - pause - "I haven't seen all the data"

CMFX was OK - a specific process }
this is not a particular process } (?)

Scott wants us to define "significant risk"
☆ put in a ¶

Mr. SCULLY. "ERG report, tenuous." Yes, the comments from OMB at that meeting were not at all complimentary.

The CHAIRMAN. Whose notes are these?

Mr. SCULLY. I think those are Carol Burton's notes. Are they dated 8-27-87?

The CHAIRMAN. Yes.

Mr. SCULLY. That was the Director of the Office of Mechanical Engineering Safety Standards.

THE CHAIRMAN. You were at the meeting? Well, do you think it is fair to say that the notes indicate that OMB believed the analytical basis for the standard was the weakest they had seen; is that right?

Mr. SCULLY. That's what they stated, the weakest they had ever seen. However, we did not consider that to be so. We had very good BLS information, Bureau of Labor Statistics information; we had work injury reports; we had studies done in the field; we had all kinds of information to present.

The CHAIRMAN. The notes also indicated that Barry White asked OMB whether they wanted to kill the standard, and OMB hedged.

Mr. SCULLY. Out of complete frustration, yes, sir, that's true.

The CHAIRMAN. When was the next time you met with OMB to discuss the proposal?

Mr. SCULLY. The next meeting was February 2, I believe.

The CHAIRMAN. That's this year?

Mr. SCULLY. Eight months later.

The CHAIRMAN. 1988?

Mr. SCULLY. February 1988.

The CHAIRMAN. And in the meantime, did you have to draft an item for the President's regulatory agenda regarding the lockout standard?

Mr. SCULLY. Yes, sir, I did.

The CHAIRMAN. Did Michael Baroody circulate a memo providing guidance on how to draft the items?

Mr. SCULLY. Yes, he did.

The CHAIRMAN. I have a copy of that memo, and it states: "Changes in time and policy. Many DOL items have either undergone a long delay or been changed significantly. Our reasons for change have to be better developed this year. Negotiations with OMB are not a sufficient reason. We will probably have to include some discussion of the policy consideration involved in any changes that are made."

[The memo referred to follows:]

D White

U.S. Department of Labor

Assistant Secretary for Policy
Washington, D.C. 20210

ENTERED
10/27/87

OCT 26 1987

MEMORANDUM FOR FRED ALVAREZ
TOM KOMAREK
DAVID O'NEAL
JOHN PENDERGRASS
GEORGE SALEM
ROGER SEMERAD
DON SHASTEEN
DAVID WALKER
KATHY UTGOFF

FROM: MICHAEL BAROODY

SUBJECT: Regulatory Program for 1988-1989

Attached is a copy of OMB Bulletin 88-1 which contains the detailed instructions for the preparation of the President's Program for the period April 1, 1988 to March 31, 1989 and the next semi-annual regulatory agenda. OMB has directed that our draft materials for the next regulatory program be submitted to them by January 4, 1988. This gives us less time than in the past for you to prepare drafts, submit them to the PRB and allow for some changes to be made based on whatever decisions are then made. (The semi-annual agenda submission, which must be consistent with the program, does not have to be submitted to OMB until February 26, 1988.)

Because of this speeding up of the process, it will be necessary for the PRB to receive your draft materials (both sections for the Department's overview statement and significant regulatory activity - SRA - statements for each specific major area of regulatory activity) by December 4, 1987. The PRB will meet on your proposals about mid-December. (Unless there are massive changes in an item, SRA's used last year should be marked up with appropriate changes rather than retyped in total. Copies of your SRA's from last year either are attached or will be forwarded in a few days - all are on OASP' word processors.)

In preparing your draft materials, there are a number of factors which need to be kept in mind. These include:

1. Coordination with SOL - Regulatory actions require close coordination with SOL. Before submission to the PRB, all draft SRA's need to be reviewed by SOL both for legal sufficiency and for determining the feasibility of the schedules.

2. Schedules - The Department has had a tendency to miss the schedules included in the regulatory program. We can expect OMB to closely scrutinize any changes in proposed schedules from those just included in the last semi-annual regulatory agenda. We want the schedules to be realistic. But, at the same time, there is a need to push harder on some items that have taken too long and been subject to too many slippages in the past.

3. Changes in Timing and Policy - This was a new section added last year to each SRA. Many DOL items have either undergone a long delay or have been changed significantly. Our reasons for change will have to better developed this year. (Negotiations with OMB are not a sufficient reason - we will probably have to include some discussion of the policy considerations involved in any changes that are made.) Moreover, the other sections of the SRA's may need bolstering, especially if we have moved from an early stage in the rulemaking to a later one. Note, if an item was included last year but a decision has now been made not to regulate, an SRA is still required showing the reasons for the decision.

4. Coordination with the Budget and Legislative Program - Note that any legislative or budget initiative that is relevant must be described in terms of the expected impact on regulatory activities. For example, ESA's overview will need to mention proposed changes in the Davis-Bacon and Service Contracts Acts.

5. Paperwork - OMB is requiring closer coordination between regulatory proposals and paperwork reduction efforts. To the extent that it is possible, SRA's should mention the potential paperwork impact of the regulatory activity. Proposed changes in the Copeland Act and any changes that will be proposed under ERISA are examples of a legislative tie to paperwork reduction that should be mentioned in agency overviews.

6. Coordination with other Agencies - Some regulatory actions require close coordination with other Federal agencies (e.g., PWBA with Treasury, OSHA and MSHA with NIOSH and EPA, OFCCP with EEOC and Justice, etc.). SRA's must reflect how our efforts are being coordinated with these agencies and the schedules must take their participation into account. OMB will closely check this.

7. Specific Items - Attached are some regulatory questions for most agencies that have arisen during the past months and which need to be addressed before we make DOL's submission to OMB. Some of these have been raised by OMB or the Congress or in public hearings. Others evolve from such other considerations as the Secretary's priorities (e.g., with regard to Workforce 2000) or actions needed to ensure consistency and coordination within DOL.

Please designate one staff member to be the contact point for your agency's preparation of materials by October 30. If you have any questions, please either contact me or Bob Copeland of my staff (he can be reached on 523-6197).

Attachments

OSHA

1. Medical Surveillance and Exposure Monitoring - OMB accepted this item with reluctance in past years, largely on the basis that OSHA had not yet even decided whether rulemaking is needed. The PRB recently approved the development of an ANPR for each of these items. The SRA will have to be strengthened considerably and take into account OMB's desire (expressed in the paperwork budget process) for an evaluation of OSHA's experience with medical surveillance requirements.

2. General Safety and Health Programs - OMB directed that this item be withdrawn from the semi-annual regulatory agenda, leaving open the question as to whether it would be acceptable in the regulatory program. Assuming that the PRB approves further work on this project, the SRA that was drafted this fall will have to be strengthened if OMB is to be persuaded to accede to it. One area that needs work is to give some data on how well it has worked both under the VPP and in the construction industry.

3. PEL Update - The SRA for this project should show how it ties with the medical surveillance and exposure monitoring efforts (and perhaps others such as respirators) as well as how it is being coordinated with MSHA's air quality projects.

4. Hazard Communications - Despite issuing a final standard this year, it appears likely that future regulatory actions may be contemplated. Hence, an SRA probably will be required.

5. Overview

    a. OSHA should explain in better detail how its regulatory development processes are coordinated to ensure adequately taking into account the possible economic and paperwork impacts in a timely manner for decision-making. It may also be appropriate to mention any trade offs that are made, e.g., that paperwork may be required in lieu of more direct federal enforcement efforts.

    b. MDA - the mediate rulemaking effort should be discussed in terms of how well (or poorly) it worked in developing the NPRM.

Attachment
Bulletin No. 88-1

INSTRUCTIONS FOR DESCRIBING SIGNIFICANT REGULATORY ACTIONS

Coverage

Pursuant to Section 5 of this Bulletin, the head of each agency covered by this Bulletin shall submit information describing each proposed Significant Regulatory Action (grouped as specified in Section 7 of this Bulletin), using the topic headings identified below. An agency need not provide a detailed narrative description of an SRA that has been completed.

General Instructions

Each agency shall provide concise but complete information relating to the topic headings listed below. For those portions of the agency submission that are typed, follow the format below. Because OMB may use optical scanners to "read" typed submissions, it is important for agencies to type the headings exactly as given below, and double-space the entire entry. Submit at least one original copy, either typed or printed on a letter-quality printer.

Each narrative description of a Significant Regulatory Action shall adhere to the following format:

TITLE OF REGULATION (typed or printed all in capital letters)

Problem To Be Solved

Need for Federal Solution

Approach

Changes in Policy and Timing (An agency should include this topic heading only if the SRA was also described in the 1987 Regulatory Program, and changes in timing or policy occurred.)

Next Steps

Legal Deadline:

Milestones:
Action Date

Agency Contact

RIN:

Each agency shall assemble its submission in the correct order, with divider pages, where appropriate, as follows:

1) Department Name

2) Agency or Component Name

3) Stage (either Prerule, Proposed Rule, or Final Rule)

In publishing the Regulatory Program of the United States Government (April 1, 1988 - March 31, 1989), OMB will add to this narrative description a Regulation Identifier Number (RIN) (if not previously assigned).

A. Instructions for "Problem to Be Solved": This explanation should answer the question "Why?" -- why act, why regulate? Is there sufficient need to warrant any governmental action at all? The agency should briefly and factually describe the underlying problem to be solved, e.g., the market failure or health-and-safety risks to be addressed, or the benefits to be provided, in such a way as to justify and demonstrate the need for the Federal agency to take action.

In some instances, a statute may not afford the agency any regulatory discretion. In such cases, "Why regulate?" is answered by carefully describing the relevant statutory requirements. If, in the agency's view, a regulatory action is required by law but does not respond to any true market failure or other real problem warranting action by the agency, the agency should specifically so state. In other instances, the agency may believe that a statute affords discretion only to make certain factual findings, or that the statute permits consideration of only certain categories of information in making its findings, but that once those findings are made the statute requires regulatory action. In these circumstances, the agency should describe the relevant statutory provisions and the specific factual basis for the findings it is authorized to make even though it may not yet have made such findings.

If an SRA is at a very early stage, the issue facing the agency may be precisely whether there is any problem worth addressing. In this case, the SRA description should clearly state that the agency is trying to determine whether a significant problem exists and should describe the actions it plans to take in order to make that determination. Agencies should never assume the existence of a problem, nor should they infer the existence of a problem based upon inadequate evidence.

For example, an agency may have regulatory authority to mitigate the harm caused by certain kinds of health-and-safety risks. It may be concerned about a particular hazard on which it has heard reports from industry or workers or which is the subject of a new academic study. Before the agency acts, it must undertake to analyze the scope of the hazard, and to estimate the potential for resultant risks. The agency then will have to identify the causal linkage between the hazard and the alleged health-and-safety effects, assess the potential human exposure and the likely effects on humans, and balance the likely costs of correction against the health-and-safety benefits likely to be obtained. In this example, specific agency efforts to document the existence and potential effects of the hazard -- the surveys, the planned data collections, and the evaluation -- should be described in the problem statement.

In other cases, the problem may arise because implementation of a complex statute is causing unexpected and undesirable economic or other unintended effects. If so, explain what the statute requires and how it or implementing regulations appear to cause or contribute to the problem. This explanation could include statutory barriers to the agency's choice of a regulatory strategy that might be more efficient and effective, or that might result in a sounder solution to the underlying problem. It could also describe regulatory constraints on the private sector or State and local governments that could be relaxed in order to improve program performance or at least to mitigate deleterious side-effects.

B. Instructions for "Need For Federal Solution": This explanation should explain "Who" -- who should regulate? Would it be more effective or less expensive for the Federal government to solve the problem instead of private parties or State or local governments? Any explanation of why the Federal government should act should also explain the converse -- why private parties are not sufficiently motivated or able to solve the problem, and why State or local governments may not be the best ones to solve the problem. If a Federal statute authorizes or permits the agency to modify private incentives or to help State or local governments to solve the problem, then the agency should explain how it plans to use such authority.

If there is a statutory or judicial mandate requiring Federal action, the agency should cite and describe its scope and the extent to which it actually relates, in the agency's view, to an underlying problem in need of a Federal solution.

C. Instructions for "Approach": This explanation should answer the question "How?" -- how might the problem be solved, and what alternative solutions, or methods of implementation, is the agency considering? The agency should summarize each Federal regulatory solution that is being considered, including the major advantages and disadvantages of each, and any groups of persons, firms, or political jurisdictions that would receive a significant benefit or bear a significant cost if that solution were implemented.

In some cases, the problem may be caused by an existing regulation. One solution might be to repeal the regulation; another might be to revise the regulation in order to cure the defect. This description should provide a sufficient factual basis to indicate which of the possible solutions will best address the underlying causes of the problem or how the agency will be making that determination.

Every agency regulatory activity should support and further the policy goals and priorities of the Administration, consistent with all applicable legal requirements. If the agency is planning to act in order to solve a documented problem, and if solving that problem is properly, in the view of the Administration, a function for the Federal government, then the agency should explain specifically how its regulatory activity supports the overall regulatory directions and policies that have been approved and supported by the Administration. In explaining the consistency of its regulatory activity with Administration policy, the agency should describe why the possible regulatory action is consistent with law. The agency should also specifically identify the provisions or aspects of the Administration's regulatory principles, as set forth in Executive Order No. 12291 and the 1983 Presidential Task Force Report, cited in Section 1(d) of Executive Order No. 12498, with which the regulatory activity is consistent.

The agency should also describe any limitations or circumstances that may reasonably cause it to take a regulatory action that conflicts with any of the Administration's regulatory principles, policies, and priorities. If the action will not support Administration policy, the agency must explain the statute or other legal requirement that nonetheless compels such activity.

D. Instructions for "Changes in Policy and Timing": This explanation should answer the question "Why the change?" -- what has changed from the previously published description and timetable, and why did this happen? For any Significant Regulatory Action that was described in the 1987 Regulatory Program, an agency shall explain any noteworthy development and any change in substantive policy that took place over the course of the Prior Program Year. The agency shall also identify and justify any change in any target date published under "Next Steps" in the 1987 Regulatory Program.

Noteworthy developments include, among other things, the initiation and completion of a study or an outside contract to obtain new data; an important analysis of data; significant efforts to involve the public further in the rulemaking development; and important legal steps to complete the SRA. Changes in substantive policy include any redefinition of the problem to be solved (either through the reaching of substantive factual conclusions or through the reinterpretation of regulatory discretion afforded the agency under applicable law); any refinement in the evaluation of the need for a Federal solution (including greater or lesser involvement by private parties or State or local governments in contributing to the problem or in helping to implement the solution of the problem); and any addition, deletion or change in the alternatives under consideration for solving the problem.

Changes in target dates for regulatory development may be caused by changes in agency workload or statutory responsibilities, in agency priorities, or in agency management or personnel. Any agency explanation of a change in any previously published target date should carefully and clearly describe the reasons for the change.

Agencies should note that if they want to change the policy or schedule for a Significant Regulatory Action after publication in the 1988 Regulatory Program, they should comply with the procedures set forth in Section 5.d of the Bulletin.

—. MEMO-REGARDING - CHANGES TO REGULATORY PROGRAM & OMB INVOLVMENT — 11/5/87
SCULLY TO BURTNER ✓

⑤

From - J J Scully
To - C Burtner
Subject - Regulatory Program and Regulatory Agenda Text.

As directed I've updated the Regulatory Program attached to reflect the fact that OMB action or inaction is not to be recorded in the current status. The changes involve areas dealing with the scope, policy and timing that have occurred since the last reporting and that are critical to the regulatory action involving [illegible]

Q- REGARDING - [illegible] 11/5/81

USDOL/OSHA RIN: 1218-AA53

REGULATION TITLE: Control of Hazardous Energy Sources (Lockout/Tagout) (Part 1910)

Problem to Be Solved

The United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) petitioned the Occupational Safety and Health Administration (OSHA) in 1979 to establish an emergency temporary standard (ETS) for locking out machinery and equipment. Fatalities involving 22 UAW members were attributed to lockout-related causes. Since then, the data developed in several OSHA studies using fatality/catastrophe investigation reports of hazardous energy-related accidents, as well as a Bureau of Labor Statistics (BLS) survey of workers injured between August and November 1980 while servicing equipment, suggest that a regulation may be necessary.

One OSHA study limited to Federal program States, and covering the period from May 1974 through April 1978, showed 83 fatalities related to lockout/tagout problems. Moreover, the BLS survey reported an average of 24 lost workdays per hazardous energy-related injury, as compared to the national average of 16 in the private sector for all lost-workday injuries.

USDOL/OSHA RIN: 1218-AA53

REGULATION TITLE: Control of Hazardous Energy Sources
(Lockout/Tagout) (Part 1910)

OSHA's current General Industry Standards, Part 1910, became effective August 15, 1971, pursuant to Section 6(a) of the Act. This section allowed OSHA to promulgate national consensus standards and federally established standards without comment or hearing. Incomplete lockout-related provisions currently are dispersed throughout these standards that were adopted by OSHA, and they have proved to be inadequate for employee protection. The lack of standards relating to the control of energy sources has resulted in the extensive use of OSHA's General Duty Clause, Section 5(a)(1), to accomplish that purpose. This method, however, is largely dependent on the state of the art within a given industry and the availability of consensus standards. The use of Section 5(a)(1) has resulted in varying requirements being placed on employers and many problems relating to compliance and interpretations.

Need for Federal Solution

Because there are various approaches for the control of hazardous energy currently being used with differing degrees of effectiveness, it is necessary to establish a minimum acceptable procedure in providing for employee safety.

USDOL/OSHA RIN: 1218-AA53

REGULATION TITLE: Control of Hazardous Energy Sources (Lockout/Tagout) (Part 1910)

Consensus standards, by themselves, have not generally proven effective for reducing injuries in the workplace. These standards were designed to be voluntary in nature.

Approach

The American National Standards Institute Standard, ANSI Z244.1-1982 For Personnel Protection-Lockout/Tagout of Energy Source--Minimum Safety Requirements, is being used as the basis of OSHA's proposal. The scope and application of OSHA's proposed standard, however, will be closely defined in order to reflect the impact of OSHA's regulatory impact analysis. further OSHA's proposal will ~~ultimately~~ confine its application to specific machine and equipment hazards and employee activities to prevent too broad an interpretation for appropriate usage ~~address lockout-related hazards in each industry sector in which the available data indicate those hazards to~~ be signi~~ficant.~~

The proposal will be a standard to cover potentially hazardous energy sources. It would require the training of employees in the use of these procedures, and with the aid of a nonmandatory appendix, it would provide employers and employees with a set of rules and voluntary guidelines on

USDOL/OSHA RIN: 1218-AA53

REGULATION TITLE: Control of Hazardous Energy Sources (Lockout/Tagout) (Part 1910)

which to base company lockout/tagout procedural efforts. The Agency has identified a potential paperwork burden estimated at ~~2,035,900~~ 2,075,700 hours in the first year. — [illegible]

Changes in Policy and Timing

Delay in ~~development~~ final acceptance of the NPRM is due to problems encountered in coordinating all necessary input for the internal decision making process. ~~Legal issues which have resulted from the Hazard~~ Communication Standard, and ~~to account for numerous internal~~ ~~Department of Labor reviews of this innovative proposal.~~

Next Steps

Legal deadline. None.

Milestones:

Action	Date
ANPRM	June 17, 1980
NPRM Comment Period End	September 15, 1980
Preproposal Draft Submitted	July 1983
NPRM	~~May 1987~~ 1/00/[illegible]
Final Action	~~July 1988.~~ 3/00/[illegible]

Final [illegible]

USDOL/OSHA RIN: 1218-AA53

REGULATION TITLE: Control of Hazardous Energy Sources (Lockout/Tagout) (Part 1910)

Agency Contact

Barry J. White, Director
Directorate of Safety Standards Programs
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room N3605, FP Building
Washington, DC 20210
(202) 523-8061

The CHAIRMAN. So you could not say that OMB was causing the delay of the lockout, even though they were; is that right?

Mr. SCULLY. That's true.

The CHAIRMAN. Did you subsequently change the description of the lockout standard for the regulatory program so that all references to OMB were removed?

Mr. SCULLY. I did not mention OMB, that's true. My statement had the status, still, for internal review.

The CHAIRMAN. I understand that just a few days ago, on the eve of the oversight, OMB finally released a proposal for publication; is that right?

Mr. SCULLY. It came back to SOL, Solicitor of Labor, I believe on the 14th. And yes, they have approved it.

The CHAIRMAN. So that is the 14th of April; is that correct?

Mr. SCULLY. That is right.

The CHAIRMAN. So the proposal sat at OMB for almost a year; is that right?

Mr. SCULLY. That is right; 11 months.

The CHAIRMAN. In your opinion do you think it should have taken 11 months for OSHA to issue a proposal when there is such a compelling need for the standard?

Mr. SCULLY. No, sir, I do not.

The CHAIRMAN. By OSHA's estimate of 150 deaths a year we are talking about 1,650 workers having been killed while OSHA was working on a mere proposal; is that correct?

Mr. SCULLY. That is true.

The CHAIRMAN. I understand that you are nearing retirement and that you were determined to get this proposal out before you retire.

Mr. SCULLY. Held off for two years.

The CHAIRMAN. Senator Simon.

Senator SIMON. I just want to commend you, Mr. Scully, and all the rest of you, for standing up. If it were not for people like you who were willing, despite the frustrations that you have described, were willing to stand up and speak up for people who are out there who do not even know the kind of threats they face very often, I do not know where we would be.

It becomes easy for politicians to denounce bureaucrats and government employees. You are examples of people who are standing up doing what this Nation ought to be doing.

I just want you to know we are very proud of you.

Mr. SCULLY. Thank you.

The CHAIRMAN. I think Senator Simon said it well. I think you have really provided a very important service, not just to this committee, but I think both to the Senate and hopefully to the agency.

I think that signals certainly ought to go out. I want to give you certainly the assurance, too, as far as this Senator is concerned, and I think I can speak for the others, that we are going to watch very carefully.

You have provided a very important service to us. You have come here at the request of the whole committee and the Senate and this committee has the responsibility and oversight of OSHA.

So we want to make sure that there is going to be no kind of recrimination, because this testimony reaches the heart of the whole system and process, and we want to certainly give you those assurances.

And certainly as long as I am the chairman of the committee, and I am sure Senator Simon, Senator Metzenbaum, I think I speak for Republican and Democrat alike, we are enormously indebted to you for the service. The best way we can show that appreciation is by following up on this testimony and try and give you the support you deserve so that the competency and the commitment and the dedication you clearly have is directed towards the protection of the American workers.

And I want you to know that we are strongly committed to following the recommendations that you make in the future as well.

Senator SIMON. If I could add one other point, and I say this not to our witnesses, but to those in charge of OSHA and OMB, what we want is not simply that the letter of the law is followed, but that the spirit of the law is followed, and that is not happening. That is what's clear.

The CHAIRMAN. Thank you very much. You are excused. You are welcome to stay for the rest of the hearing, but we will move to a second panel.

Our next witness, Mr. Ronald Sarnacki, a compliance safety officer from Irving, Texas, OSHA area office; Ms. Michelle Vallon, an industrial hygienist from the Irving, Texas OSHA office; and John Barry, an industrial hygienist from the Philadelphia regional office.

Mr. Sarnacki, what is your present position?

STATEMENTS OF RONALD SARNACKI, COMPLIANCE SAFETY OFFICER, OSHA, IRVING, TX; MS. MICHELE VALLON, INDUSTRIAL HYGIENIST, OSHA, IRVING, TX; AND DR. JOHN BARRY, INDUSTRIAL HYGIENIST, OSHA, PHILADELPHIA, PA

Mr. SARNACKI. Senator, I am the safety and health compliance officer of the Dallas area office station in Irving, Texas.

The CHAIRMAN. If you would hold for just a moment or two while we quiet the hearing room down.

[Pause.]

The CHAIRMAN. And how long have you held that position?

Mr. SARNACKI. I have been with OSHA for 14 years, Senator.

The CHAIRMAN. And what did you do prior to going with OSHA?

Mr. SARNACKI. Prior to that, I was with the safety staff of the United States Air Force.

The CHAIRMAN. And do you have a family?

Mr. SARNACKI. Yes, sir, I do.

The CHAIRMAN. And is there constant pressure on compliance officers to obtain high numbers of inspections?

Mr. SARNACKI. Yes, sir, there are.

The CHAIRMAN. And does this tend to emphasize the quantity rather than quality of inspections?

Mr. SARNACKI. That is correct, sir.

The CHAIRMAN. Does this tend to provide less protection for the safety of workers?

Mr. SARNACKI. It does.

The CHAIRMAN. And does the pressure for numbers increase near the end of the fiscal year?

Mr. SARNACKI. It does, sir.

The CHAIRMAN. And on September 19th, 1987, the last day of the fiscal year, were you and three other compliance officers called into the office of the area director?

Mr. SARNACKI. Yes, sir, we were. That was the day prior to the end of the fiscal year.

The CHAIRMAN. I believe that is September 30th.

Mr. SARNACKI. Yes, sir.

The CHAIRMAN. And were the area director and safety supervisor present?

Mr. SARNACKI. They were, sir.

The CHAIRMAN. And did you receive a briefing on what you were to do?

Mr. SARNACKI. Yes, sir, we did.

The CHAIRMAN. What were you told to do?

Mr. SARNACKI. We were told—this was on the 29th, prior to the closing of the work day—we were told to generate numbers the next day that was——

The CHAIRMAN. What do you mean, generate numbers?

Mr. SARNACKI. To go out and do construction inspections where the most numbers are at, and initiate the OSHA-1's, make the opening conference, return to the area office, generate the OSHA-1's so they can be put into the system prior to the end of the fiscal year and then do the inspection at a later date.

The CHAIRMAN. So an OSHA-1 form is, what, a preliminary form?

Mr. SARNACKI. The OSHA Form 1 is the preliminary form that goes into the system to initiate the inspection.

The CHAIRMAN. And did all four of you go out to different large construction sites where there are a number of subcontractors?

Mr. SARNACKI. That is correct. We tried to get the larger sites.

The CHAIRMAN. And did each of you go out and do as your director instructed?

Mr. SARNACKI. Yes, sir, we all did what we were instructed.

The CHAIRMAN. You were told to go out and hold an opening conference and get just enough information to complete the OSHA-1 form, and then go back to the office, fill out the OSHA-1 form, get the numbers into the system, and go back later and do the inspection; is that right?

Mr. SARNACKI. That's correct.

The CHAIRMAN. And does that amount to advance notice?

Mr. SARNACKI. In a sense, yes.

The CHAIRMAN. Well, it gives a pretty good idea. You visit there, and then you are going to come back to that site some time afterwards. The employer knew you'd be back and could rectify any safety violations; is that right?

Mr. SARNACKI. Yes, sir, they would have had time to correct any safety violations?

The CHAIRMAN. Is that legal under the act?

Mr. SARNACKI. That is not legal, no.

The CHAIRMAN. How many OSHA-1's did you and the other three inspectors succeed in filling out that day?

Mr. SARNACKI. Between the four of us, there were 48 OSHA-1's.

The CHAIRMAN. Forty-eight?

Mr. SARNACKI. Yes, sir.

The CHAIRMAN. And the OSHA-1 forms were evidence which was entered into the system as inspections; is that right?

Mr. SARNACKI. That is correct, sir.

The CHAIRMAN. So you completed the 48 OSHA-1 forms which went into the system showing 48 inspections completed that day; is that right?

Mr. SARNACKI. That is right.

The CHAIRMAN. But no inspections had actually been conducted, had they?

Mr. SARNACKI. Not completed, no, sir.

The CHAIRMAN. The companies knew that you would be back, is that right?

Mr. SARNACKI. Yes, sir, they would.

The CHAIRMAN. And they would be able to correct any of the safety violations they had?

Mr. SARNACKI. That is correct.

The CHAIRMAN. Could workers also get injured or killed during the interim?

Mr. SARNACKI. Absolutely.

The CHAIRMAN. Did you go back the next day and do the inspection?

Mr. SARNACKI. Yes, sir, I did.

The CHAIRMAN. And do you think this is a proper way to conduct inspections?

Mr. SARNACKI. No, sir, it is not, according to the field operation manual, no.

The CHAIRMAN. Now, OSHA recently revoked a policy of record check inspections. What is a record check inspection?

Mr. SARNACKI. A record check inspection is where you enter an establishment, do a lost workday injury rate, and if it falls below the national average of 4.2 percent, you do not do a full inspection, you just do the hazard communication portion and depart the site.

The CHAIRMAN. Is that a bad policy?

Mr. SARNACKI. Yes, sir.

The CHAIRMAN. Should it have been revoked long ago?

Mr. SARNACKI. Absolutely.

The CHAIRMAN. Did the policy invite underreporting of injuries and illnesses?

Mr. SARNACKI. I'm sure it did.

The CHAIRMAN. Are most citations settled in informal conferences with the employer and the area directors?

Mr. SARNACKI. Many of them are, yes, sir.

The CHAIRMAN. Are you ever invited to those informal conferences?

Mr. SARNACKI. No, sir.

The CHAIRMAN. Do you think you should be?

Mr. SARNACKI. Yes, sir.

The CHAIRMAN. Why?

Mr. SARNACKI. To have a chance to do an input into the meeting.

The CHAIRMAN. Well, would it be helpful to you in attempting to protect workers if there was a confined space standard?

Mr. SARNACKI. Yes, sir, there would be.

The CHAIRMAN. And then without such standards you just cite the 5(a) General Duty Clause, is that right?

Mr. SARNACKI. Yes, sir.

The CHAIRMAN. Is that difficult to do because of the evidence and documentation which is required?

Mr. SARNACKI. It is very difficult.

The CHAIRMAN. Do such citations have to be—maybe you can tell us about the General Duty Clause.

Mr. SARNACKI. A 5(a)(1) is a General Duty Clause where an employer is required to provide a safe workplace for his employee.

If we had no standards as such, we have to go back to a 5(a)(1) and use backup, like an ANSI standard or some other published safety standard.

To get the 5(a)(1) approved through our regional office and so forth is very difficult.

The CHAIRMAN. Are there other safety standards that are needed?

Mr. SARNACKI. Yes, sir.

The CHAIRMAN. And did you recently have a case where you recommended willful and egregious citations with penalties totaling $54,000?

Mr. SARNACKI. Yes, sir.

The CHAIRMAN. What kind of case was it?

Mr. SARNACKI. That was a construction contractor, subcontractor, and the citation was issued on an unguarded scaffold.

The CHAIRMAN. Unguarded scaffolding?

Mr. SARNACKI. Scaffolding, yes, sir.

The CHAIRMAN. And were the citations reduced, and the case settled?

Mr. SARNACKI. Yes, sir.

The CHAIRMAN. And I understand a number of OSHA offices were closed in Texas. Which ones were closed in your area?

Mr. SARNACKI. The Tyler office, and the Fort Worth office were closed.

The CHAIRMAN. Would it be better if they were open?

Mr. SARNACKI. Absolutely.

The CHAIRMAN. Why?

Mr. SARNACKI. It would save the government money by having the compliance officers in these areas rather than sending personnel TDY to these areas.

In the case of a fatality, or a complaint, the compliance officers would be in the immediate area to respond.

The CHAIRMAN. Ms. Vallon, what is your present position?

Ms. VALLON. I am an industrial hygienist with the Dallas area office.

The CHAIRMAN. And how long have you been an industrial hygienist?

Ms. VALLON. Since 1978.

The CHAIRMAN. And what is your educational background?

Ms. VALLON. I have a master's in public health.

The CHAIRMAN. A master's in public health.

Do you have other degrees as well?

Ms. VALLON. Yes, sir.

The CHAIRMAN. What are they?

Ms. VALLON. I have an associate in science in medical technology; a bachelor's in environmental health; and I'm currently working on another bachelor's in rehab counseling.

The CHAIRMAN. Very impressive background. How many counties do you cover out of the Irving office?

Ms. VALLON. We cover 61 counties.

The CHAIRMAN. That is a large area. Do you have enough compliance officers to cover that area?

Ms. VALLON. No.

The CHAIRMAN. Were several OSHA offices closed in Texas in the early '80s?

Ms. VALLON. In 1982 I was working in the Beaumont office, and that office was closed.

The CHAIRMAN. And do you think that was a good idea?

Ms. VALLON. No.

The CHAIRMAN. Do the compliance officers often have to travel long distances to conduct inspections?

Ms. VALLON. Yes, they do.

The CHAIRMAN. And did you recently drive three hours to conduct an inspection in an area that was formerly covered by a closed OSHA office?

Ms. VALLON. Yes, I did.

The CHAIRMAN. Where was that inspection?

Ms. VALLON. That was in Longview, Texas.

The CHAIRMAN. And there was an OSHA office that formerly covered that area, is that right?

Ms. VALLON. Yes, sir.

The CHAIRMAN. Ms. Vallon, is there a great emphasis on the number of inspections conducted in the Irving area office?

Ms. VALLON. Yes, sir, there is.

The CHAIRMAN. Is there a constant pressure to get numbers?

Ms. VALLON. Yes.

The CHAIRMAN. Is it known as a numbers game?

Ms. VALLON. Definitely.

The CHAIRMAN. And does it result in more quantity but less quality?

Ms. VALLON. Definitely, yes.

The CHAIRMAN. And do you feel that it results in you not being able to use your experience and training in the way you should?

Ms. VALLON. Oh, definitely, sure.

The CHAIRMAN. Is one of the quickest way for a safety inspector to obtain numbers to go to a large construction site where there are a number of subcontractors?

Ms. VALLON. Yes, sir.

The CHAIRMAN. Is that because a number of inspections can be accomplished at one location?

Ms. VALLON. Yes, sir.

The CHAIRMAN. And do you as an industrial hygienist ordinarily visit construction sites?

Ms. VALLON. No, sir.

The CHAIRMAN. On January 5th of this year, were you directed by your acting supervisor to accompany a safety inspector to a construction site to conduct an inspection?

Ms. **Vallon**. Yes, sir, I was.

The **Chairman**. And was the purpose of your going with the safety inspector merely to double the number of inspectors?

Ms. **Vallon**. Yes.

The **Chairman**. And did your supervisor say that's why you were being sent out?

Ms. **Vallon**. They did not exactly say.

The **Chairman**. Well, did you draw that conclusion?

Ms. **Vallon**. Yes, I did.

The **Chairman**. And what construction project was it?

Ms. **Vallon**. It was an IBM construction site, it was a site where IBM—it was an IBM site.

The **Chairman**. And where was it located?

Ms. **Vallon**. It was located in Roanoke, Texas.

The **Chairman**. And how long were you and the safety inspector at the site?

Ms. **Vallon**. We were on site technically five days.

The **Chairman**. But realistically, how long?

Ms. **Vallon**. Three.

The **Chairman**. And how many inspections did you make with the safety inspector?

Ms. **Vallon**. I generated 25 OSHA-1's, and the safety compliance officer also generated 25 OSHA-1's.

The **Chairman**. And these are copies of those forms—do they look at this distance to be the ones that you filed?

[The forms referred to follow:]

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

A1 [illegible]

3. Optional Report Number
4. Inspection Number (identifies this inspection) ▶ **100794106**

[illegible] [illegible] 301

5. C 120162 1

Type | Number | Satisfied ☐ S ☐ H | Type | Number | Satisfied ☐ S ☐ H

6. Total Entries

7. ☒ No | If Yes enter ▶ | Type | Number

8. [illegible] Inc

9.

10. [illegible] Hwy. Precinct Line [illegible], TX [illegible]

11. City Code: 5820

12. County Code: 121

13. Mailing Address

16475 [illegible] Pkwy, Ste 300, Dallas, TX 75245

14. Telephone Number: 214/931-0650

15.

16. Telephone Number (Site)

Ownership 17 ☒

18.

Inspection Opening 19 ☒

20. Opening Conference Date: 1-5-85

Inspection Category 21 ☒ Health

22. Primary SIC: 1623

23. Secondary SIC
a. Guide

Inspection Type 24

Unprogrammed

☒ Unprogrammed Related

Programmed

25. **Inspection Classification** (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c. ☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information

26. Number of Employees: 20

27. Number of Employees: 20

28. Number of Employees Controlled by Employer: 165

29. a ☐ Union
b ☒ Non-Union

30. a ☐ Employee Exercised Walkaround Privilege?

OSHA-200 Data

31.

32. ☒ Data Not Available

33. LWDI Rate

34.

(8) (9) (10) (11) (12) (13)

Scope of Inspection 35 a ☒ Comprehensive Inspection b ☐ Partial Inspection c ☐ Records Only Inspection d ☐ No Inspection

36. Number of Days Site Visited: 5

Warrant Information 37

38.

39. Date Re-Entered

40. Date Re-Denied

41. Date Re-Entered

42. Optional Information

Type	ID	Value	Type	ID	Value
N	1	244 0235			

43. Total Entries

Closed Case 44
a ☐
b ☐

45. If no inspection conducted, mark "x" in one box
a ☐ Establishment Not Found
b ☐ Employer Out of Business
c ☐ Process To Be Inspected Not Active
d ☐ Ten or Fewer Employees
e ☐ Denied Entry
f ☐ SIC Not on Planning Guide
g ☐ Worksite Exempt Through Voluntary Program
h ☐ Non-Exempt Consultation in Progress
i ☐ Other

46. Closing Conference Date (On Site): 1/14/88

47. CSHO Signature: Michele Walters | Date: [illegible]

48. Reviewer Signature | Date: [illegible] 88

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Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

3. [illegible] Report Number
4. Inspection Number (identifies this inspection) ▶ **100794072**

6. Total Entries: 1

Type | Number | Satisfied ☐ S ☐ H

7. [illegible] ☒ No
If Yes, enter ▶ Type | Number

8. [illegible] Inc

[redacted]

11. City Code: 5820
12. County Code: 121

14. Telephone Number: 214/445-0338

13. [illegible] Tx 75051

16. Telephone Number (Site)

Ownership	17. ☒ [illegible]
	[redacted]
Inspection Opening	19. [illegible] ☒ No
	20. Opening Conference Date: 1-5-88
Inspection Category	21. [illegible] ☒
	22. Primary SIC: 1771
	23. Secondary SIC a. Guide
	[redacted]
Inspection Type	24. [illegible] Unprogrammed ☒ [illegible] Programmed

25. **Inspection Classification** (Mark all that apply)

a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
☐ Local Emphasis Program (specify)
☐ National Emphasis Program (specify)
☐ Migrant Farmworker Camp

Employee Information	26. 4	27. 4	28. Number of Employees Controlled By Employer: 50	29. a ☐ Union b ☒ Non Union	30. a ☐ Employee Exercised Walkaround Privilege?
					[redacted]
OSHA-200 Data	31.	32. ☒			33. LWDI Rate

34. (8) (9) (10) (11) (12) (13)

Scope of Inspection	35. ☒ [illegible] ☐ No Inspection	36. Number of Days Site Visited: 5
Warrant Information	37. 38. 39.	40. Date Re-Denied 41. Date Re-Entered

42. Optional Information
Type | ID | Value
N 1 [illegible]

43. Total Entries

Closed Case 44. 45. [illegible]
g ☐ Worksite Exempt Through Voluntary Program
h ☐ Non-Exempt Consultation in Progress
i ☐ Other

46. Closing Conference Date (On Site): 1/14/88

47. [illegible]
48. Reviewer's Signature
Date

OSHA-1 (Rev. 1/84)

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

MOD Date

1. Reporting ID [illegible]

2. CSHO ID [illegible]

3. Optional Report Number 302

4. Inspection Number (identifies this inspection) ▶ **100794122**

5. Related Activity / Activity Satisfied — 5.1 Type Number [illegible] Satisfied ☐ S ☐ H — 5.2 Type Number Satisfied ☐ S ☐ H — 5.3 Type Number Satisfied ☐ S ☐ H

6. Total Entries

7. Previous Activity — Has there been previous activity at this establishment? ☐ Yes ☒ No — If Yes enter ▶ Type Number

8. a ☐ Change? b. Establishment Name [illegible]

9. [illegible]

10. a ☐ Change? b. Site Address (Street, City, State, ZIP) [illegible]

11. City Code 5520

12. County Code 171

13. Mailing Address (if different) (Street, City, State, ZIP) [illegible]

14. Telephone Number [illegible]

15. Name of Controlling Corporation, Partner, or Owner

16. Telephone Number (Site)

Ownership 17. a ☒ Private Sector c ☐ State Government b ☐ Local Government d ☐ Federal Agency/Code

18. [illegible]

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No

20. Opening Conference Date 1-5-83

Inspection Category 21. Mark "X" in one box ☐ Safety ☒ Health

22. Primary SIC 1711

23. Secondary SIC a. Guide

Inspection Type 24. Mark "X" in one box

Unprogrammed
- a ☐ Fatality/Catastrophe
- b ☐ Complaint
- c ☐ Referral
- d ☐ Monitoring
- e ☐ Variance
- f ☐ Follow up
- g ☒ Unprogrammed Related

Programmed
- h ☐ Planned
- i ☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
- a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
- b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
- c ☐ Local Emphasis Program (specify)
- d ☐ National Emphasis Program (specify)
- e ☐ Migrant Farmworker Camp

Employee Information 26. Number of Employees Employed in Establishment [illegible]

27. Number of Employees Covered by Inspection [illegible]

28. Number of Employees Controlled by Employer [illegible]

29. a ☐ Union b ☒ Non-Union

30. a ☐ Employee Exercised Walkaround Privilege?

OSHA-200 Data Copy below the OSHA-200 Log entries for the most current complete year

31. Year 32. ☒ Data Not Available

33. LWDI Rate

34.

Occupational Injury Cases						Occupational Illness Cases (7)												
(1)	(2)	(3)	(4)	(5)	(6)	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(8)	(9)	(10)	(11)	(12)	(13)

Scope of Inspection 35. Scope (Mark "X" in one box) a ☒ Comprehensive Inspection b ☐ Partial Inspection c ☐ Records Only Inspection d ☐ No Inspection

36. Number of Days Site Visited

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes

38. Date of Denial

39. Date Re-Entered

40. Date Re-Denied

41. Date Re-Entered

42. **Optional Information**

Type	ID	Value	Type	ID	Value
N	1	2440225			

43. Total Entries

44.
- a ☐ Close
- b ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box
- a ☐ Establishment Not Found
- b ☐ Employer Out of Business
- c ☐ Process To Be Inspected Not Active
- d ☐ Ten or Fewer Employees
- e ☐ Denied Entry
- f ☐ SIC Not on Planning Guide.
- g ☐ Worksite Exempt Through Voluntary Program
- h ☐ Non-Exempt Consultation in Progress
- i ☐ Other

46. Closing Conference Date (On Site) 1/14/83

47. CSHO Signature [illegible] Date [illegible]

48. Reviewer Signature [illegible] Date

OSHA-1 (Rev 1/84)

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

M[illegible] 1. Reporting ID 2. [illegible] 3. Optional Report Number

4. Inspection Number (Identifies this Inspection) ▶ 100794130

5. Related Activity: Type, Number, Satisfied ☐ S ☐ H

5.? Type, Number, Satisfied ☐ S ☐ H

6. Total Entries 1

7. Previous Activity
Has there been previous activity at this establishment? ☐ Yes ☒ No — If Yes enter ▶ Type, Number

8. a ☐ Change? b. Establishment Name [redacted]

10. a ☐ Change? b. Site Address (Street, City, State, Zip)

11. City Code

12. County Code 121

13. Mailing Address (If different) (Street, City, State, ZIP)

14. Telephone Number

15. Name of Controlling Corporation, Partner, or Owner

16. Telephone Number (Site)

Ownership 17. a ☒ Private Sector c ☐ State Government b ☐ Local Government d ☐ Federal Agency/Code [redacted]

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No

20. Opening Conference Date 1 5 88

Inspection Category 21. Mark "X" in one box ☐ Safety ☒ Health

22. Primary SIC 1721

23. Secondary SIC a. Guide [redacted]

Inspection Type 24. Mark "X" in one box

Unprogrammed
- a ☐ Fatality/Catastrophe
- b ☐ Complaint
- c ☐ Referral
- d ☐ Monitoring
- e ☐ Variance
- f ☐ Follow-up
- g ☒ Unprogrammed Related

Programmed
- h ☐ Planned
- i ☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
- a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
- b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
- c ☐ Local Emphasis Program (specify)
- d ☐ National Emphasis Program (specify)
- e ☐ Migrant Farmworker Camp

Employee Information
26. Number of Employees Employed in Establishment 4
27. Number of Employees Covered by Inspection 4
28. Number of Employees Controlled by Employer 6
29. a ☐ Union b ☒ Non Union
30. a ☐ Employee Exercised Walkaround Privilege? [redacted]

OSHA-200 Data Copy below the OSHA 200 log entries for the most current complete year
31. Year 32. ☒ Data Not Available 33. LWDI Rate

Occupational Injury Cases						Occupational Illness Cases (7)						
(1)	(2)	(3)	(4)	(5)	(6)	(a) (b) (c) (d) (e) (f) (g)	(8)	(9)	(10)	(11)	(12)	(13)
34.												

Scope of Inspection 35. Scope (Mark "X" in one box) a ☒ Comprehensive Inspection b ☐ Partial Inspection c ☐ Records Only Inspection d ☐ No Inspection

36. Number of Days Site Visited 5

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes 38. Date of Denial 39. Date Re-Entered 40. Date Re-Denied Date Re-Entered

42. **Optional Information**

Type	ID	Value	Type	ID	Value
N	1	244[illegible]			

43. Total Entries

Closed Case
44.
- a ☐ Close
- b ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box
- a ☐ Establishment Not Found
- b ☐ Employer Out of Business
- c ☐ Process To Be Inspected Not Active
- d ☐ Ten or Fewer Employees
- e ☐ Denied Entry
- f ☐ SIC Not on Planning Guide
- g ☐ Worksite Exempt Through Voluntary Program
- h ☐ Non-Exempt Consultation in Progress
- i ☐ Other

46. Closing Conference Date (On Site) 1/14/88

47. CSHO Signature Date
48. Reviewer Signature Date 1-20-88

OSHA-1 (Rev. 1/84)

AREA OFFICE COPY

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

MOD Date

1. Reporting ID: [illegible]
2. CSHO ID: [illegible]
3. Optional Report Number: 294
4. Inspection Number (identifies this inspection) ▶ 100794031

5. Related Activity/Activity Satisfied
5.1 Type [illegible] Number [illegible] Satisfied ☐ S ☐ H
5.2 Type Number Satisfied ☐ S ☐ H
5.3 Type Number Satisfied ☐ S ☐ H
6. Total Entries: 1

7. Previous Activity
Has there been previous activity at this establishment? ☐ Yes ☒ No
If Yes, enter ▶ Type Number

8. a. ☐ Change? b. Establishment Name: [illegible] & Company
[redacted]

10. a. ☐ Change? b. Site Address (Street, City, State, ZIP): [illegible], TX [illegible]
11. City Code: 5320
12. County Code: 121

13. Mailing Address (If different) (Street, City, State, ZIP): [illegible], Dallas, TX [illegible]
14. Telephone Number: 214/388-4421

15. Name of Controlling Corporation, Partner, or Owner: [illegible]
16. Telephone Number (Site)

Ownership
17. a. ☒ Private Sector b. ☐ Local Government c. ☐ State Government d. ☐ Federal Agency/Code
[redacted]

Inspection Opening
19. Was Advance Notice Given? ☐ Yes ☒ No
20. Opening Conference Date: 1-5-85

Inspection Category
21. Mark "X" in one box ☐ Safety ☒ Health
22. Primary SIC: 1722
23. Secondary SIC
a. Guide
[redacted]

Inspection Type
24. Mark "X" in one box
Unprogrammed
a. ☐ Fatality/Catastrophe
b. ☐ Complaint
c. ☐ Referral
d. ☐ Monitoring
e. ☐ Variance
f. ☐ Follow-up
g. ☒ Unprogrammed Related
Programmed
h. ☐ Planned
☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c. ☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information
26. Number of Employees Employed in Establishment: 20
27. Number of Employees Covered by Inspection: 20
28. Number of Employees Controlled by Employer: 200
29. a. ☐ Union b. ☒ Non-Union
30. a. ☐ Employee Exercised Walkaround Privilege?
[redacted]

OSHA-200 Data
Copy below the OSHA 200 log entries for the most current complete year
31. Year
32. ☒ Data Not Available
33. LWDI Rate

34.	Occupational Injury Cases (1)	(2)	(3)	(4)	(5)	(6)	Occupational Illness Cases (7) (a)	(b)	(c)	(d)	(e)	(f)	(g)	(8)	(9)	(10)	(11)	(12)	(13)

Scope of Inspection
35. Scope (Mark "X" in one box) a. ☒ Comprehensive Inspection b. ☐ Partial Inspection c. ☐ Records Only Inspection d. ☐ No Inspection
36. Number of Days Site Visited: 5

Warrant Information
37. Anticipatory Warrant/Subpoena Served ☐ Yes
38. Date of Denial
39. Date Re-Entered
40. Date Re-Denied
41. Date Re-Entered

42. Optional Information

Type	ID	Value	Type	ID	Value
N	1	2440225			

43. Total Entries

Closed Case
44. a. ☐ Close b. ☐ No Citations Issued
45. If no inspection conducted, mark "X" in one box
a. ☐ Establishment Not Found
b. ☐ Employer Out of Business
c. ☐ Process To Be Inspected Not Active
d. ☐ Ten or Fewer Employees
e. ☐ Denied Entry
f. ☐ SIC Not on Planning Guide
g. ☐ Worksite Exempt Through Voluntary Program
h. ☐ Non-Exempt Consultation in Progress
i. ☐ Other
46. Closing Conference Date (On Site): 1/14/85

47. CSHO Signature: [illegible] Date: [illegible]
48. Reviewer Signature: [illegible] Date: [illegible]

OSHA-1 (Rev. 1/84)

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

MOD Date

1. Reporting ID [illegible]

2. CSHO ID [illegible]

3. Optional Report Number [illegible]

4. Inspection Number (identifies this inspection) ▶ **100794064**

5. Related Activity / Activity Satisfied
5.1 Type Number [illegible] Satisfied ☐ S ☐ H
5.2 Type Number Satisfied ☐ S ☐ H
5.3 Type Number Satisfied ☐ S ☐ H

6. Total Entries 1

7. Previous Activity
Has there been previous activity at this establishment? ☐ Yes ☒ No
If Yes enter ▶ Type Number

8. a. ☐ Change? b. Establishment Name [illegible] Co.

9. Employer ID

10. a. ☐ Change? b. Site Address (Street, City, State, ZIP) [illegible]

11. City Code 5830

12. County Code 131

13. Mailing Address (if different) (Street, City, State, ZIP) [illegible]

14. Telephone Number [illegible]

15. Name of Controlling Corporation, Partner, or Owner

16. Telephone Number (Site)

Ownership 17. a. ☒ Private Sector b. ☐ Local Government c. ☐ State Government d. ☐ Federal Agency / Code

18. Legal Entity (Optional) a. ☐ Corporation b. ☐ Partnership c. ☐ Sole Owner

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No

20. Opening Conference Date 1-5-88

Inspection Category 21. Mark "X" in one box ☐ Safety ☒ Health

22. Primary SIC 1761

23. Secondary SIC a. Guide

Inspection Type 24. Mark "X" in one box

Unprogrammed
- a. ☐ Fatality/Catastrophe
- b. ☐ Complaint
- c. ☐ Referral
- d. ☐ Monitoring
- e. ☐ Variance
- f. ☐ Follow-up
- g. ☒ Unprogrammed Related

Programmed
- h. ☐ Planned
- ☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
- a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
- b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
- c. ☐ Local Emphasis Program (specify)
- d. ☐ National Emphasis Program (specify)
- e. ☐ Migrant Farmworker Camp

Employee Information
26. Number of Employees Employed in Establishment 20
27. Number of Employees Covered by Inspection 20
28. Number of Employees Controlled by Employer 100
29. a. ☐ Union b. ☒ Non-Union
30. a. ☐ Employee Exercised Walkaround Privilege?
b. ☐ Employees Interviewed

OSHA-200 Data Copy below the OSHA 200 log entries for the most current complete year
31. Year
32. ☒ Data Not Available
33. LWDI Rate

34. Occupational Injury Cases (1) (2) (3) (4) (5) (6) Occupational Illness Cases (7) (a) (b) (c) (d) (e) (f) (g) (8) (9) (10) (11) (12) (13)

Scope of Inspection 35. Scope (Mark "X" in one box) a. ☒ Comprehensive Inspection b. ☐ Partial Inspection c. ☐ Records Only Inspection d. ☐ No Inspection

36. Number of Days Site Visited 5

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes
38. Date of Denial
39. Date Re-Entered
40. Date Re-Denied
41. Date Re-Entered

42. **Optional Information**

Type	ID	Value	Type	ID	Value
N	1	2446235			

43. Total Entries

Closed Case 44 a. ☐ Close b. ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box
- a. ☐ Establishment Not Found
- b. ☐ Employer Out of Business
- c. ☐ Process To Be Inspected Not Active
- d. ☐ Ten or Fewer Employees
- e. ☐ Denied Entry
- f. ☐ SIC Not on Planning Guide
- g. ☐ Worksite Exempt Through Voluntary Program
- h. ☐ Non-Exempt Consultation in Progress
- ☐ Other

46. Closing Conference Date (On Site) 1/4/88

47. CSHO Signature [illegible] Date [illegible]

48. Reviewer Signature Date [illegible]

OSHA-1 (Rev. 3/84)

Inspection Report

U.S. Department of Labor

Occupational Safety and Health Administration

3. 216

4. Inspection Number ▶ 100794148

Type | Number | Satisfied ☐ S ☐ H | 8. Total Entries /

Type | Number

11. City Code | 12. County Code 121

14. Telephone Number

16. Telephone Number (Site)

Ownership 17. ☒

Inspection Opening 19. ☒ No

20. Opening Conference Date 1 2 88

Inspection Category 21. ☒ Health

22. Primary SIC 1799

23. Secondary SIC a. Guide

Inspection Type 24.

Unprogrammed

☒ Unprogrammed Related

Programmed

Programmed Related

25. **Inspection Classification** (Mark all that apply)

a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime

b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime

c. ☐ Local Emphasis Program (specify)

d. ☐ National Emphasis Program (specify)

e. ☐ Migrant Farmworker Camp

Employee Information 26. 11 | 27. 16 | 28. Number of Employees Controlled by Employer 17

29. a. ☐ Union b. ☒ Non-Union

30. a. ☐ Employee Exercised Walkaround Privilege?

OSHA-200 Data 31. | 32. ☒ Data Not Available

33. LWDI Rate

Occupational Illness Cases

(1) … (7)	(8)	(9)	(10)	(11)	(12)	(13)

34.

Scope of Inspection 35. ☒ | ☐ Records Only Inspection | d. ☐ No Inspection

36. Number of Days Site Visited 5

Warrant Information 37. | 38. | 39. Date Re Entered | 40. Date Re Denied | 41. Date Re Entered

42. Optional Information

Type	ID	Value	Type	ID	Value
A	1	2111			

43. Total Entries

Closed Case 44. | 45.

a. ☐ Establishment Not Found | d. ☐ Ten or Fewer Employees | g. ☐ Worksite Exempt Through Voluntary Program

b. ☐ Employer Out of Business | e. ☐ Denied Entry | h. ☐ Non-Exempt Consultation in Progress

c. ☐ Process To Be Inspected Not Active | f. ☐ SIC Not on Planning Guide | i. ☐ Other

46. Closing Conference Date (On Site) 1/14/88

47. CSHO Signature | Date | 48. Reviewer Signature | Date 1 21 88

OSHA-1 (Rev. 1/84)

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

1. [illegible] 2. [illegible] 3. [illegible] Report Number 4. Inspection Number (identifies this inspection) ▶ **100794023**

[illegible] [illegible] 293

5. Related Activity: Type Number Satisfied 1 [illegible] ☐S ☐H | Type Number Satisfied ☐S ☐H
6. Total Entries 1

7. Previous Activity: Has there been previous activity at this establishment? ☐ Yes ☒ No — If yes, enter ▶ Type Number

8. a. ☐ Change? b. Establishment Name [illegible] [redacted]

10. a. ☐ Change? b. Site Address (Street, City, State, ZIP) [illegible]
11. City Code
12. County Code 121

13. Mailing Address (if different) (Street, City, State, ZIP) [illegible]
14. Telephone Number [illegible]

15. Name of Controlling Corporation, Partner, or Owner
16. Telephone Number (Site)

Ownership 17. a. ☒ Private Sector ☐ State Government b. ☐ Local Government d. ☐ Federal Agency Code [redacted]

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No
20. Opening Conference Date 1-5-83

Inspection Category 21. Mark "X" in one box ☐ Safety ☒ Health
22. Primary SIC 1711
23. Secondary SIC a. Guide [redacted]

Inspection Type 24. Mark "X" in one box

Unprogrammed
a. ☐ Fatality/Catastrophe
b. ☐ Complaint
c. ☐ Referral
d. ☐ Monitoring
e. ☐ Variance
f. ☐ Follow-up
g. ☒ Unprogrammed Related

Programmed
h. ☐ Planned
☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c. ☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information
26. Number of Employees Employed in Establishment [illegible]
27. Number of Employees Covered by Inspection [illegible]
28. Number of Employees Controlled by Employer [illegible]
29. a. ☐ Union b. ☒ Non-Union
30. a. ☐ Employee Exercised Walkaround Privilege? [redacted]

OSHA-200 Data Copy below the OSHA-200 log entries for the most current complete year
31. Year
32. ☒ Data Not Available
33. LWDI Rate

Occupational Injury Cases (1)	(2)	(3)	(4)	(5)	(6)	Occupational Illness Cases (7) (a) (b) (c) (d) (e) (f) (g)	(8)	(9)	(10)	(11)	(12)	(13)
34.												

Scope of Inspection 35. Scope (Mark "X" in one box) a. ☒ Comprehensive Inspection b. ☐ Partial Inspection c. ☐ Records Only Inspection d. ☐ No Inspection
36. Number of Days Site Visited 5

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes
38. Date of Denial
39. Date Re-Entered
40. Date Re-Denied
41. Date Re-Entered

42. **Optional Information**

Type	ID	Value	Type	ID	Value
N	1	244023			

43. Total Entries

Closed Case
44. a. ☐ Close b. ☐ No Citations Issued
45. If no inspection conducted, mark "X" in one box
a. ☐ Establishment Not Found
b. ☐ Employer Out of Business
c. ☐ Process To Be Inspected Not Active
d. ☐ Ten or Fewer Employees
e. ☐ Denied Entry
f. ☐ SIC Not on Planning Guide
g. ☐ Worksite Exempt Through Voluntary Program
h. ☐ Non-Exempt Consultation in Progress
i. ☐ Other
46. Closing Conference Date (On Site) 1/14/83

47. CSHO Signature [illegible] Date [illegible]
48. Reviewer Signature Date [illegible]

OSHA-1 (Rev. 1/84)

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Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

MOD Date

1. Reporting ID: 622200
2. CSHO ID: U6264
3. Optional Report Number: 295
4. Inspection Number (identifies this inspection) ▶ 100794049

5. Related Activity/Activity Satisfied: 5.1 Type C Number 121176351 Satisfied ☐ S ☐ H; 5.2 Type Number Satisfied ☐ S ☐ H; 5.3 Type Number Satisfied ☐ S ☐ H
6. Total Entries: 1

7. Previous Activity
Has there been previous activity at this establishment? ☐ Yes ☒ No If Yes enter ▶ Type Number

8. a ☐ Change? b. Establishment Name: [illegible] Boring Co.
[redacted]

10. a ☐ Change? b. Site Address (Street, City, State, ZIP): [illegible]
11. City Code: 5320
12. County Code: 121

13. Mailing Address (If different) (Street, City, State, ZIP): 7159 [illegible] Dr. Dallas, TX 75220
14. Telephone Number: 214/220-5593

15. Name of Controlling Corporation, Partner, or Owner
16. Telephone Number (Site)

17. a ☒ Private Sector c ☐ State Government
b ☐ Local Government d ☐ Federal Agency/Code
[redacted]

19. Was Advance Notice Given? ☒ Yes ☐ No
20. Opening Conference Date: 1-5-88

21. Mark "X" in one box ☐ Safety ☒ Health
22. Primary SIC: 1721
23. Secondary SIC
a. Guide
[redacted]

24. Mark "X" in one box

Unprogrammed
a ☐ Fatality/Catastrophe
b ☐ Complaint
c ☐ Referral
d ☐ Monitoring
e ☐ Variance
f ☐ Follow-up
g ☒ Unprogrammed Related

Programmed
h ☐ Planned
i ☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c ☐ Local Emphasis Program (specify)
d ☐ National Emphasis Program (specify)
e ☐ Migrant Farmworker Camp

26. Number of Employees Employed in Establishment: 5
27. Number of Employees Covered by Inspection: 5
28. Number of Employees Controlled by Employer: 65
29. a ☐ Union b ☒ Non-Union
30. a ☐ Employee Exercised Walkaround Privilege?
[redacted]

Copy below the OSHA 200 Log entries for the most current complete year
31. Year
32. ☒ Data Not Available
33. LWDI Rate

Occupational Injury Cases						Occupational Illness Cases (7)						
(1)	(2)	(3)	(4)	(5)	(6)	(a) (b) (c) (d) (e) (f) (g)	(8)	(9)	(10)	(11)	(12)	(13)

35. Scope (Mark "X" in one box) a ☒ Comprehensive Inspection b ☐ Partial Inspection c ☐ Records Only Inspection d ☐ No Inspection
36. Number of Days Site Visited: 5

37. Anticipatory Warrant/Subpoena Served ☐ Yes
38. Date of Denial
39. Date Re-Entered
40. Date Re-Denied
41. Date Re-Entered

42. **Optional Information**

Type	ID	Value	Type	ID	Value
N	1	2440235			

43. Total Entries

44. a ☐ Close b ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box
a ☐ Establishment Not Found
b ☐ Employer Out of Business
c ☐ Process To Be Inspected Not Active
d ☐ Ten or Fewer Employees
e ☐ Denied Entry
f ☐ SIC Not on Planning Guide
g ☐ Worksite Exempt Through Voluntary Program
h ☐ Non-Exempt Consultation in Progress
i ☐ Other

46. Closing Conference Date (On Site): 1/4/88

47. CSHO Signature: [illegible] Date: [illegible]
48. Reviewer Signature: [illegible] Date: [illegible] 88

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Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

3. Optional Report Number
4. Inspection Number identifies this inspection ▶ **100794080**

[illegible] 277

5. [illegible] 1211 [illegible]
Type Number Satisfied ☐ S ☐ H
5.3 Type Number Satisfied ☐ S ☐ H
6. Total Entries 1

7. [illegible] ☒
Type Number

8. Cooley Concrete Coring Corporation

[redacted]

10. [illegible] Roanoke, TX 76262
11. City Code 5520
12. County Code 121

13. [illegible] Arlington, TX [illegible]
14. Telephone Number 814/512-0610

15. [illegible]
16. Telephone Number (Site)

Ownership 17. a ☒ [illegible] ☐ State Government ☐ Federal Agency Code

[redacted]

Inspection Opening 19. [illegible] ☐ Yes ☒ [illegible]
20. Opening Conference Date 1-5-88

Inspection Category 21. [illegible] ☐ Safety ☒ Health
22. Primary SIC 1799
23. Secondary SIC
a. Guide

[redacted]

Inspection Type 24. [illegible]
Unprogrammed
☒ Unprogrammed [illegible]
Programmed

25. **Inspection Classification** (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information
26. 1
27. 1
28. Number of Employees Controlled by Employer 10
29. a ☐ Union b ☒ Non-Union
30. a ☐ Employee Exercised Walkaround Privilege?

[redacted]

OSHA-200 Data
31. [illegible]
32. ☒ [illegible]
33. LWDI Rate

34.
(8) (9) (10) (11) (12) (13)

Scope of Inspection 35. ☒ [illegible] ☐ Records Only Inspection ☐ No Inspection
36. Number of Days Site Visited 5

Warrant Information 37. 38.
39. Date Re-Entered
40. Date Re-Denied
41. Date Re-Entered

42. Optional Information
N 1 [illegible]
Value

43. Total Entries

Closed Case 44. 45.
g ☐ Worksite Exempt Through Voluntary Program
h ☐ Non-Exempt Consultation in Progress
☐ Other
46. Closing Conference Date (On Site) 1/14/88

47. [illegible]
48. Reviewer's Signature
Date [illegible]

OSHA-1 (Rev. 1/84)

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

11/21/97 MP

MOD Date
1. Reporting ID: [illegible]
2. CSHO ID: [illegible]
3. Optional Report Number: 300
4. Inspection Number (identifies this inspection) ▶ **100794098**

5. Related Activity/Activity Satisfied
5.1 Type / Number: C 121163 51 — Satisfied ☐ S ☐ H
5.2 Type / Number — Satisfied ☐ S ☐ H
5.3 Type / Number — Satisfied ☐ S ☐ H
6. Total Entries: 1

7. Previous Activity
Has there been previous activity at this establishment? ☐ Yes ☒ No — If Yes enter ▶ Type Number

8. a ☐ Change? b. Establishment Name: HBC Utilities Service, Inc. [redacted]

10. a ☐ Change? b. Site Address (Street, City, State, ZIP): [illegible]
11. City Code: 5320
12. County Code: 121

13. Mailing Address (if different) (Street, City, State, ZIP): P.O. Box [illegible]
14. Telephone Number: 517/457-2333

15. Name of Controlling Corporation, Partner, or Owner
16. Telephone Number (Site)

17. a ☒ Private Sector c ☐ State Government b ☐ Local Government d ☐ Federal Agency/Code [redacted]

19. Was Advance Notice Given? ☐ Yes ☒ No
20. Opening Conference Date: 1-5-88

21. Mark "X" in one box ☐ Safety ☒ Health
22. Primary SIC: 1623
23. Secondary SIC a. Guide [redacted]

24. Mark "X" in one box

Unprogrammed
a ☐ Fatality/Catastrophe
b ☐ Complaint
c ☐ Referral
d ☐ Monitoring
e ☐ Variance
f ☐ Follow-up
g ☒ Unprogrammed Related

Programmed
h ☐ Planned
☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
a Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c ☐ Local Emphasis Program (specify)
d ☐ National Emphasis Program (specify)
e ☐ Migrant Farmworker Camp

26. Number of Employees Employed in Establishment: 10
27. Number of Employees Covered by Inspection: 10
28. Number of Employees Controlled by Employer: 83
29. a ☐ Union b ☒ Non-Union
30. a ☐ Employee Exercised Walkaround Privilege? [redacted]

Copy below the OSHA 200 Log entries for the most current complete year
31. Year
32. ☒ Data Not Available
33. LWDI Rate

Occupational Injury Cases (1)	(2)	(3)	(4)	(5)	(6)	Occupational Illness Cases (7) (a) (b) (c) (d) (e) (f) (g)	(8)	(9)	(10)	(11)	(12)	(13)

35. Scope (Mark "X" in one box) a ☒ Comprehensive Inspection b ☐ Partial Inspection c ☐ Records Only Inspection d ☐ No Inspection
36. Number of Days Site Visited: 5

37. Anticipatory Warrant/Subpoena Served ☐ Yes
38. Date of Denial
39. Date Re-Entered
40. Date Re-Denied
41. Date Re-Entered

42. **Optional Information**

Type	ID	Value	Type	ID	Value
N	1	244C235			

43. Total Entries

44. a ☐ Close b ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box
a ☐ Establishment Not Found
b ☐ Employer Out of Business
c ☐ Process To Be Inspected Not Active
d ☐ Ten or Fewer Employees
e ☐ Denied Entry
f ☐ SIC Not on Planning Guide
g ☐ Worksite Exempt Through Voluntary Program
h ☐ Non-Exempt Consultation in Progress
i ☐ Other

46. Closing Conference Date (On Site): 1/04/88

47. CSHO Signature: Michele Walker Date: [illegible]
48. Reviewer Signature: [illegible] Date: [illegible] 88

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Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

MOD Date
1. Reporting ID: 626300
2. CSHO ID: V6264
3. Optional Report Number: 302
4. Inspection Number (Identifies this Inspection) ▶ **100794114**

5. Related Activity: Activity Satisfied
5.1 Type / Number: C 72116351 — Satisfied ☐ S ☐ H
5.2 Type / Number: — Satisfied ☐ S ☐ H
5.3 Type / Number: — Satisfied ☐ S ☐ H
6. Total Entries

7. Previous Activity
Has there been previous activity at this establishment? ☐ Yes ☒ No — If yes enter ▶ Type Number

8. a ☐ Change? b. Establishment Name: [illegible] Inc [redacted]

10. a ☐ Change? b. Site Address (Street, City, State, ZIP): [illegible] TX [illegible]
11. City Code: 5820
12. County Code: 121

13. Mailing Address (if different) (Street, City, State, ZIP): P.O. Box 1324 [illegible]
14. Telephone Number: (817)481-4513

15. Name of Controlling Corporation, Partner, or Owner:
16. Telephone Number (Site)

Ownership 17. a ☒ Private Sector b ☐ Local Government c ☐ State Government d ☐ Federal Agency/Code [redacted]

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No
20. Opening Conference Date: 1-5-88

Inspection Category 21. Mark "X" in one box: ☐ Safety ☒ Health
22. Primary SIC: 1799
23. Secondary SIC a. Guide [redacted]

Inspection Type 24. Mark "X" in one box

Unprogrammed
- a ☐ Fatality/Catastrophe
- b ☐ Complaint
- c ☐ Referral
- d ☐ Monitoring
- e ☐ Variance
- f ☐ Follow up
- g ☒ Unprogrammed Related

Programmed
- h ☐ Planned
- i ☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
- a Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
- b Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
- c ☐ Local Emphasis Program (specify)
- d ☐ National Emphasis Program (specify)
- e ☐ Migrant Farmworker Camp

Employee Information
26. Number of Employees Employed in Establishment: 7
27. Number of Employees Covered by Inspection: 7
28. Number of Employees Controlled by Employer: 10
29. a ☐ Union b ☒ Non-Union
30. a ☐ Employee Exercised Walkaround Privilege? [redacted]

OSHA-200 Data Copy below the OSHA-200 log entries for the most current complete year
31. Year
32. ☒ Data Not Available
33. LWDI Rate

34.

Occupational Injury Cases						Occupational Illness Cases (7)							
(1)	(2)	(3)	(4)	(5)	(6)	(a) (b) (c) (d) (e) (f) (g)	(8)	(9)	(10)	(11)	(12)	(13)

Scope of Inspection 35. Scope (Mark "X" in one box): a ☒ Comprehensive Inspection b ☐ Partial Inspection c ☐ Records Only Inspection d ☐ No Inspection
36. Number of Days Site Visited: 5

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes
38. Date of Denial
39. Date Re-Entered
40. Date Re-Denied
41. Date Re-Entered

42. **Optional Information**

Type	ID	Value	Type	ID	Value
N	1	2441235			

43. Total Entries: 1

Closed Case 44. a ☐ Other b ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box
- a ☐ Establishment Not Found
- b ☐ Employer Out of Business
- c ☐ Process To Be Inspected Not Active
- d ☐ Ten or Fewer Employees
- e ☐ Denied Entry
- f ☐ SIC Not on Planning Guide
- g ☐ Worksite Exempt Through Voluntary Program
- h ☐ Non-Exempt Consultation in Progress
- i ☐ Other

46. Closing Conference Date (On Site): 1/14/88

47. CSHO Signature: Michel [illegible] Date: [illegible]
48. Reviewer Signature: [illegible] Date: [illegible]

OSHA-1 (Rev. 1/84)

AREA OFFICE COPY

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

4. Inspection Number (Identifies this inspection) ▶ **2440287**

[illegible]

8. Total Entries

Satisfied ☐ S ☐ H

Type Number

If yes, enter ▶ Type Number

✗ No

9. Employer ID (Bureau's number)

[illegible] Company

11. City Code: 5320
12. County Code: 121

13. [illegible] Olympic Lane [illegible], TX 75220

14. Telephone Number: 214/351-8263

16. Telephone Number (Site): /

Ownership	17. ✗
	18. Legal Entity (Optional) a. ☐ Corporation b. ☐ [illegible] c. ☐ [illegible]
Inspection Opening	19. ✗
	20. Opening Conference Date: 1/5/88
Inspection Category	21. ✗
	22. Primary SIC: 1721
	23. Secondary SIC a. Guide
Inspection Type	24. Unprogrammed / Programmed ✗
	25. Inspection Classification (Mark all that apply) a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime c. ☐ State Emphasis Program (specify) d. ☐ National Emphasis Program (specify) e. ☐ Migrant Farmworker Camp
Employee Information	26. 43
	27. 43
	28. Number of Employees Controlled by Employer: 500
	29. a ☐ Union b ☒ Non-Union
	30. a ☐ Employee Exercised Walkaround Privilege?
OSHA-200 Data	31.
	32. ✗
	33. LWDI Rate
	(10) (11) (12) (13)
34.	
Scope of Inspection	35. ✗ ☐ Records Only ☐ No Inspection
	36. Number of Days Site Visited: 2
Warrant Information	37.
	38.
	39. Date Re Entered
	40. Date Re Denied
	41. Date Re Entered

42. Optional Information

N 1 2440238

Type | ID | Value

43. Total Entries

Closed Case	44.
	45. [illegible] (mark "X" in one box) a. ☐ Establishment Not Found d. ☐ Ten or Fewer Employees g. ☐ Worksite Exempt Through Voluntary Program b. ☐ Employer Out of Business e. ☐ Denied Entry h. ☐ Non Exempt Consultation in Progress c. ☐ Process To Be Inspected Not Active f. ☐ SIC Not on Planning Guide i. ☐ Other
	46. Closing Conference Date (On Site)

47. [illegible] Date

48. Reviewer Signature [illegible] Date 1/11/88

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Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

11 1/11 mB

Mngt. Data | 1. Reporting ID | 2. Office | 3. Optional Report Number
[illegible] V0164 26

4. Inspection Number (identifies this inspection) ▶ **2440295**

5. Related Activity | Type | Number | Satisfied: ☐ S ☐ H
C 72116237

6. Type | Number | Satisfied: ☐ S ☐ H

8. Total Entries

7. Previous Activity — Has there been previous activity at this establishment? ☐ Yes ☒ No — If Yes enter ▶ Type | Number

8. a ☐ Change? b. Establishment Name
Texas Industries Corporation Inc

9. Employer ID Number (Optional)

10. a ☐ Change? b. Site Address (Street, City, State, ZIP)
[illegible] Hwy [illegible], TX 76262

11. City Code: 5570

12. County Code: 121

13. Mailing Address (if different) (Street, City, State, ZIP)
1222 Crowley Rd [illegible], TX 75050

14. Telephone Number: 214/245-2511

15. Name of Controlling Corporation, Partner, or Owner

16. Telephone Number (Site): 817/430-8125

Ownership 17. a ☒ Private Sector b ☐ Local Government c ☐ State Government d ☐ Federal Agency Code

18. Legal Entity (Optional) a ☐ Corporation b ☐ Partnership c ☐ Sole Owner

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No

20. Opening Conference Date: 1-5-88

Inspection Category 21. Mark "X" in one box ☐ Safety ☒ Health

22. Primary SIC: 1142

23. Secondary SIC a. Guide

Inspection Type 24. Mark "X" in one box

Unprogrammed
- a ☐ Fatality/Catastrophe
- b ☐ Complaint
- c ☐ Referral
- d ☐ Monitoring
- e ☐ Variance
- f ☐ Follow-up
- g ☒ Unprogrammed Related

Programmed
- h ☐ Planning
- i ☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
- a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
- b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
- c ☐ Local Emphasis Program (specify)
- d ☐ National Emphasis Program (specify)
- e ☐ Migrant Farmworker Camp

Employee Information

26. Number of Employees Employed in Establishment: 85

27. Number of Employees Covered by Inspection: 5

28. Number of Employees Controlled by Employer: 120

29. a ☐ Union b ☒ Non-Union

30. a ☐ Employee Exercised Walkaround Privilege? b ☐ Employees Interviewed (Health Only)

OSHA-200 Data Copy below the OSHA-200 Log entries for the most recent complete year

31. Year

32. ☒ Data Not Available

33. LWDI Rate

Occupational Injury Cases | Occupational Illness Cases (7)

(1)	(2)	(3)	(4)	(5)	(6)	(a) (b) (c) (d) (e) (f) (g)	(8)	(9)	(10)	(11)	(12)	(13)
34.												

Scope of Inspection 35. Scope (Mark "X" in one box) a ☒ Comprehensive Inspection b ☐ Partial Inspection c ☐ Records Only Inspection d ☐ No Inspection

36. Number of Days Site Visited: 2

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes

38. Date of Denial

39. Date Re-Entered

40. Date Re-Denied

41. Date Re-Entered

42. Optional Information

Type	ID	Value	Type	ID	Value
N	1	2440235			

43. Total Entries

Closed Case

44.
- a ☐ Close
- b ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box
- a ☐ Establishment Not Found
- b ☐ Employer Out of Business
- c ☐ Process To Be Inspected Not Active
- d ☐ Ten or Fewer Employees
- e ☐ Denied Entry
- f ☐ SIC Not on Planning Guide
- g ☐ Worksite Exempt Through Voluntary Program
- h ☐ Non-Exempt Consultation in Progress
- i ☐ Other

46. Closing Conference Date (On Site)

47. CSHO Signature: Michele Valle[illegible] Date: 1/5/88

48. Reviewer Signature: [illegible] Date: 1/11/88

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Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

M.O.D. Date | 1. Reporting ID [illegible] | 2. Office ID [illegible] | 3. Optional Report Number [illegible]

4. Inspection Number Identifies this Inspection ▶ **2440261**

5. Related Activity: Type / Number / Satisfied: C [illegible]

☐ S ☐ H

6. Total Entries

7. Previous Activity: Has there been previous activity at this establishment? ☐ Yes ☒ No

a. If Yes, enter ▶ Type / Number

8. a. ☐ Change b. Establishment Name: [illegible] Inc

9. Employer ID (State's option)

10. a. ☐ Change b. Site Address (Street, City, State, ZIP): [illegible]

11. City Code: 5?20

12. County Code: 121

13. Mailing Address (if different) (Street, City, State, ZIP): [illegible] (P.O. Box 621)

14. Telephone Number: [illegible]/261-44[illegible]

15. Name of Controlling Corporation, Partner, or Owner

16. Telephone Number (Site)

Ownership 17. a. ☒ Private Sector b. ☐ State Government c. ☐ Local Government d. ☐ Federal Agency

18. Legal Entity (Optional) a. ☐ Corporation b. ☐ Partnership c. ☐ Sole Owner

Inspection Opening 19. With Advance Notice Given: ☐ Yes ☒ No

20. Opening Conference Date: Jan 5, 1988

Inspection Category 21. Mark "X" in one box: ☐ Safety ☒ Health

22. Primary SIC: 1711

23. Secondary SIC

a. Guide

b. Insp'd

Inspection Type 24. Mark "X" in one box

Unprogrammed

a. ☐ Fatality/Catastrophe
b. ☐ Complaint
c. ☐ Referral
d. ☐ Monitoring
e. ☐ Variance
f. ☐ Follow-up
g. ☒ Unprogrammed Related

Programmed

h. ☐ Planned
i. ☐ Programmed Related

25. Inspection Classification (Mark all that apply)

a. Safety Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c. ☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information

26. Number of Employees Employed in Establishment: 6
27. Number of Employees Covered by Inspection: 6
28. Number of Employees Controlled by Employer: 30
29. a. ☐ Union b. ☒ Non-Union
30. a. ☐ Employees Exercised Walkaround Privilege? b. ☐ Employees Interviewed? (States Only)

OSHA-200 Data

31. Year

32. ☒ Data Not Available

33. LWDI Rate

34. Occupational Injury Cases (1) (2) (3) (4) (5) (6) Occupational Illness Cases (7) (8) (9) (10) (11) (12) (13)

Scope of Inspection 35. Scope (Mark "X" in one box): a. ☒ Comprehensive Inspection b. ☐ Partial Inspection c. ☐ Records Only Inspection d. ☐ No Inspection

36. Number of Days Site Visited: 2

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes

38. Date of Denial

39. Date Re-Entered

40. Date Re-Denied

41. Date Re-Entered

42. Optional Information

Type	ID	Value	Type	ID	Value
N	1	2440238			

43. Total Entries

Closed Case 44. a. ☐ Close b. ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box

a. ☐ Establishment Not Found
b. ☐ Employer Out of Business
c. ☐ Process To Be Inspected Not Active
d. ☐ Ten or Fewer Employees
e. ☐ Denied Entry
f. ☐ SIC Not on Planning Guide
g. ☐ Worksite Exempt Through Voluntary Program
h. ☐ Non-Exempt Consultation in Progress
i. ☐ Other

46. Closing Conference Date (On Site)

47. CSHO Signature: Michele Vallen Date: 1/5/88

48. Reviewer Signature: [illegible] Date: 1/[illegible]/88

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Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

3. Optional Report Number
4. Inspection Number (Identifies this Inspection) ▶ **2440311**

[illegible] 283

5. [illegible]
C7211623[illegible]

Satisfied ☐ S ☐ H
Type Number Satisfied ☐ S ☐ H
6. Total Entries

7. [illegible] X
If Yes, enter ▶ Type Number

8. Rogers & Clark Inc.

9. Employer ID (State Option)

10. [illegible]

11. City Code 5520
12. County Code 121

13. [illegible]

14. Telephone Number 214/552-9999

15. [illegible]

16. Telephone Number (Site)

Ownership 17 X

18. Legal Entity (Optional) a. ☐ Corporation b. ☐ Partnership c. ☐ Sole Owner

Inspection Opening 19 X

20. Opening Conference Date 1-5-83

Inspection Category 21 X

22. Primary SIC 1622
23. Secondary SIC a. Guide b. [illegible]

Inspection Type 24

Unprogrammed

25. Inspection Classification (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime

X

Local Emphasis Program (specify)

Programmed

National Emphasis Program (specify)
Migrant Farmworker Camp

Employee Information 26 40 27 40 28 Number of Employees [illegible] NC

29. a. ☐ Union b. ☒ Non Union

30. a. ☐ Employee Exercised Walkaround Privilege?
b. ☐ Employees Interviewed? (States Only)

OSHA-200 Data 31 32 X

33. LWDI Rate

34.

Scope of Inspection 35 X

36. Number of Days Site Visited 2

Warrant Information 37 38 39. Date [illegible] 40. Date [illegible] 41. Date Re-Entered

42. Optional Information

Value

[illegible]

43. Total Entries

Closed Case 44 45

☐ Worksite Exempt Through Voluntary Program
☐ Non Exempt Consultation in Progress
☐ Other

46. Closing Conference Date (On Site)

47. [illegible]

48. Reviewer Signature

Date [illegible]

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Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

MOD. Date | 1. Reporting ID [illegible] | 2. [illegible] 292 | 3. [illegible] | 4. Inspection Number (Identifies this Inspection) ▶ **2440352**

5. Related Activity Type Number C12416337 Satisfied ☐ S ☐ H | Type Number Satisfied ☐ S ☐ H | 5.3 Type Number Satisfied ☐ S ☐ H | 6. Total Entries

7. Previous Activity
Has there been previous activity at this establishment? ☐ yes ☒ No | If yes, enter ▶ Type Number

8. a ☐ Change b. Establishment Name [illegible] Inc. | 9. Employer ID (State's option)

10. a ☐ Change b. Site Address (Street, City, State, Zip) [illegible] | 11. City Code 5820 | 12. County Code 121

13. Mailing Address (if different) (Street, City, State, Zip) [illegible] | 14. Telephone Number 214/358-4621

15. Name of Controlling Corporation, Partner or Owner | 16. Telephone Number (Site)

Ownership 17. a ☒ Private Sector c ☐ State Government b ☐ Local Government d ☐ Federal Agency | **18. Legal Entity (Optional)** a. ☐ Corporation b. ☐ Partnership c. ☐ Sole Owner

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No | 20. Opening Conference Date 1-5-88

Inspection Category 21. Mark "X" in one box ☐ Safety ☒ Health | 22. Primary SIC 1743 | 23. Secondary SIC a. Guide

Inspection Type 24. Mark "X" in one box
Unprogrammed
a ☐ Fatality/Catastrophe
b ☐ Complaint
c ☐ Referral
d ☐ Monitoring
e ☐ Follow-up
f ☐ Followup
g ☒ Unprogrammed Related
Programmed
h ☐ Planned
i ☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c. ☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information 26. Number of Employees Employed in Establishment 10 | 27. Number of Employees Covered by Inspection 10 | 28. Number of Employees Controlled by Employer 50 | 29. a ☐ Union b ☒ Non-Union | 30. a ☐ Employee Exercised Walkaround Privilege? b. ☐ Employees Interviewed (Health Only)

OSHA-200 Data 31. Year | 32 ☒ Data Not Available | 33. LWDI Rate

Occupational Injury Cases | Occupational Illness Cases

34. (1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) (13)

Scope of Inspection 35. Scope (Mark "X" in one box) a ☒ Comprehensive Inspection b ☐ Partial Inspection c ☐ Records Only Inspection d ☐ No Inspection | 36. Number of Days Site Visited 2

Warrant Information 37. Anticipatory Warrant/Subpoena Served | 38. Date Denied | 39. Date Reentered | 40. Date Re-Denied | 41. Date Re-Entered

42. **Optional Information**
Type ID Value: N 1 2440235
Type ID Value
43. Total Entries

Closed Case 44. a ☐ Safe b ☐ No Citations Issued
45. If no inspection/inspected, mark "X" in one box
a ☐ Establishment Not Found
b ☐ Employer Out of Business
c ☐ Process To Be Inspected Not Active
d ☐ Ten or Fewer Employees
e ☐ Denied Entry
f ☐ SIC Not on Planning Guide
g ☐ Worksite Exempt Through Voluntary Program
h ☐ Non-Exempt Consultation in Progress
i ☐ Other
46. Closing Conference Date (On Site)

47. CSHO Signature [illegible] | 48. Reviewer Signature [illegible] | Date [illegible]

OSHA-1 (Rev. 1/84)

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

MOD Date

1. Reporting ID: [illegible]

2. CSHO ID: V0264

3. Optional Report Number: 2 4

4. Inspection Number identifies this inspection ▶ **2440279**

5. Related Activity / Activity Satisfied: 5.1 Type [illegible] Number [illegible] Satisfied ☐ S ☐ H; 5.2 Type Number Satisfied ☐ S ☐ H; 5.3 Type Number Satisfied ☐ S ☐ H

6. Total Entries

7. Previous Activity: Has there been previous activity at this establishment? ☐ Yes ☒ No — If yes, enter ▶ Type Number

8. a. ☐ Change? b. Establishment Name: Great Western Erectors

9. Employer ID (State's option)

10. a. ☐ Change? b. Site Address (Street, City, State, ZIP): [illegible] TX [illegible]

11. City Code: 5800

12. County Code: 121

13. Mailing Address (if different) (Street, City, State, ZIP): [illegible] TX 75227

14. Telephone Number: 214/241-0110

15. Name of Controlling Corporation, Partner, or Owner

16. Telephone Number (Site)

Ownership 17. a. ☒ Private Sector b. ☐ Local Government c. ☐ State Government d. ☐ Federal Agency Code

18. Legal Entity (Optional): a. ☐ Corporation b. ☐ Partnership c. ☐ Sole Owner

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No

20. Opening Conference Date: January 5, 1988

Inspection Category 21. Mark "X" in one box: ☐ Safety ☒ Health

22. Primary SIC: 1791

23. Secondary SIC: a. Guide b. Insp'd.

Inspection Type 24. Mark "X" in one box

Unprogrammed
a. ☐ Fatality/Catastrophe
b. ☐ Complaint
c. ☐ Referral
d. ☐ Monitoring
e. ☐ Variance
f. ☐ Follow-up
g. ☒ Unprogrammed Related

Programmed
h. ☐ Planned
i. ☐ Programmed Related

25. Inspection Classification (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c. ☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information
26. Number of Employees Employed in Establishment: 46
27. Number of Employees Covered by Inspection: 46
28. Number of Employees Controlled by Employer: 500
29. a. ☐ Union b. ☒ Non-Union
30. a. ☐ Employee Exercised Walkaround Privilege? b. ☐ Employees Interviewed? (States Only)

OSHA-200 Data
31. Year
32. ☒ Data Not Available
33. LWDI Rate

Occupational Injury Cases / Occupational Illness Cases

34.

Scope of Inspection 35. Scope (Mark "X" in one box): a. ☒ Comprehensive b. ☐ Partial c. ☐ Records Only d. ☐ No Inspection

36. Number of Days Site Visited: 2

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes

38. Date of Denial

39. Date Re-Entered

40. Date Re-Denied

41. Date Re-Entered

42. Optional Information

Type	ID	Value	Type	ID	Value
N	1	2440225			

43. Total Entries

Closed Case
44. a. ☐ Close b. ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box:
a. ☐ Establishment Not Found
b. ☐ Employer Out of Business
c. ☐ Process To Be Inspected Not Active
d. ☐ Ten or Fewer Employees
e. ☐ Denied Entry
f. ☐ SIC Not on Planning Guide
g. ☐ Worksite Exempt Through Voluntary Program
h. ☐ Non-Exempt Consultation in Progress
i. ☐ Other

46. Closing Conference Date (On Site)

47. CSHO Signature: [illegible] Date: 1/5/88

48. Reviewer Signature Date: 1/ /88

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U.S. Department of Labor

2440238

6. Total Entries

9. Employer ID (State's option)

11. City Code

12. County Code

121

14. Telephone Number

1401 [illegible] Ste 4600 Dallas TX 75202

16. Telephone Number (Site)

817/420-29[illegible]

Ownership ×

18. Legal Entity (Optional)

a. ☐ Corporation b. ☐ Partnership c. ☐ Sole Owner

Inspection Opening ×

20. Jan 5 1988

Inspection Category ×

22. 1542

23.

b. Insp'd.

Inspection Type 24

25. Inspection Classification

Unprogrammed

☒ Construction ☐ Maritime

☐ Construction ☐ Maritime

Programmed ×

Employee Information

28.

29. ×

30. a. Employee Exercised Walkaround Privilege?

b. ☐ Employees Interviewed? (States Only)

500

OSHA-200 Data ×

33. WC Rate

34.

Scope of Inspection ×

36. Number of Days Site Visited 2

Warrant Information

39.

40.

41. Date Re-Entered

42. Optional Information

N 1 2440238

43. Total Entries

Closed Case 44 45.

☐ Workplace Exempt Through Voluntary Program

☐ Non Exempt Consultation in Progress

☐ Other

46. Closing Conference Date (On Site)

47. 1/4/8

48. Reviewer's Signature

Date

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

A 1/11/88 MB

1. Reporting ID 2. Office 3. Optional Report Number

[illegible]

4. Inspection Number (Identifies this Inspection) ▶ **2440337**

5. Related Activity Type Number Satisfied
[illegible] ✗

8. Total Entries

Satisfied ☐ S ☐ H

7. Previous Activity: Has there been previous activity? ☐ Yes ☒ No
If yes enter ▶ Type Number

8. Establishment Name: Bamor Engineering, Inc.

9. Employer ID

10. Site Address (Street, City, State, ZIP): [illegible]

11. City Code: 5520
12. County Code: 121

13. Mailing Address: P.O. Box 27557 Dallas, TX 75229

14. Telephone Number: 214/241-9411

15. Name of Controlling Corporation

16. Telephone Number (Site): 817/430-4240

Ownership 17. ✗

18. Legal Entity (Optional) a. ☐ Corporation b. ☐ Partnership c. ☐ Sole Owner

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No

20. Opening Conference Date: 1-5-88

Inspection Category 21. ☒ Health

22. Primary SIC: 1111
23. Secondary SIC a. Guide b. Insert

Inspection Type 24.

Unprogrammed

b. ☒

Programmed

25. **Inspection Classification** (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c. ☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information

26. Number of Employees Employed in Establishment: 65
27. Number of Employees Covered by Inspection: 65
28. Number of Employees Controlled by Employer: 150
29. a ☒ Union b. ☐ Non-Union
30. a. ☐ Employee Exercised Walkaround Privilege? b. ☐ Employees Interviewed? (States Only)

OSHA-200 Data

31. Year 32. ☒ Data Not Available
33. LWDI Rate

Occupational Injury Cases Occupational Illness Cases

(8) (9) (10) (11) (12) (13)

34.

Scope of Inspection 35. Scope a. ☒ Comprehensive Inspection b. ☐ Partial Inspection c. ☐ Records Only Inspection d. ☐ No Inspection

36. Number of Days Site Visited: 2

Warrant Information 37. ☐ Yes
38. Date of Denial 39. Date Re-Entered 40. Date Re-Denied 41. Date Re-Entered

42 **Optional Information**

Type	ID	Value	Type	ID	Value
R	1	2441335			

43. Total Entries

Closed Case

44 a ☐ Close b. ☐ No Citations Issued

45 If no inspection conducted, mark X in one box
a ☐ Establishment Not Found
b ☐ Employer Out of Business
c ☐ Process To Be Inspected Not Active
d ☐ Ten or Fewer Employees
e ☐ Denied Entry
f ☐ SIC Not on Planning Guide
g ☐ Worksite Exempt Through Voluntary Program
h ☐ Non-Exempt Consultation in Progress
i ☐ Other

46. Closing Conference Date (On Site)

47. OSHO Signature: Michael Allen Date: 1/5/88
48. Reviewer Signature: Date: 1/11/88

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Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

MOD. Date | 1. Reporting ID [illegible] | 2. Office ID [illegible] | 3. Optional Report Number [illegible]

4. Inspection Number (Identifies this inspection) ▶ **2440253**

5. Related Activity Activity Satisfied: Type Number C 121771231 Satisfied ☐S ☐H

6. Total Entries

7. Previous Activity: Has there been previous activity at this establishment? ☐ Yes ☒ No — If yes, enter ▶ Type Number

8. a. ☐ Change b. Establishment Name: [illegible] Inc.

9. Employer ID (State's option)

10. a. ☐ Change b. Site Address (Street, City, State, ZIP): [illegible] Lewisville, TX [illegible]

11. City Code: 5520

12. County Code: 121

13. Mailing Address (if different) (Street, City, State, ZIP): [illegible] Ln. Dallas, TX 75224

14. Telephone Number: 214/241-5911

15. Name of Controlling Corporation, Partner, or Owner

16. Telephone Number (Site): [illegible]/522-3212

Ownership 17. a. ☒ Private Sector c. ☐ State Government b. ☐ Local Government d. ☐ Federal Agency Code

18. Legal Entity (Optional) a. ☐ Corporation b. ☐ Partnership c. ☐ Sole Owner

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No

20. Opening Conference Date: January 5, 1985

Inspection Category 21. Mark "X" in one box: ☐ Safety ☒ Health

22. Primary SIC: 1742

23. Secondary SIC: a. Guide b. Nat'l

Inspection Type 24. Mark "X" in one box

Unprogrammed
- a. ☐ Fatality/Catastrophe
- b. ☐ Complaint
- c. ☐ Referral
- d. ☐ Monitoring
- e. ☐ Variance
- f. ☐ Followup
- g. ☒ Unprogrammed Related

Programmed
- h. ☐ Planned
- i. ☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
- a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
- b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
- c. ☐ Local Emphasis Program (specify)
- d. ☐ National Emphasis Program (specify)
- e. ☐ Migrant Farmworker Camp

Employee Information 26. Number of Employees Employed in Establishment: 50 | 27. Number of Employees Covered by Inspection: 50 | 28. Number of Employees Controlled by Employer: 200

29. a. ☐ Union b. ☒ Non-Union

30. a. ☐ Employee Exercised Walkaround Privilege? b. ☐ Employees Interviewed? (States Only)

OSHA-200 Data Copy below the OSHA-200 entries for the employer's last complete year

31. Year | 32. ☒ Data Not Available | 33. LWDI Rate

Occupational Injury Cases | Occupational Illness Cases

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)

34.

Scope of Inspection 35. Scope (Mark "X" in one box): a. ☒ Comprehensive Inspection b. ☐ Partial Inspection c. ☐ Records Only Inspection d. ☐ No Inspection

36. Number of Days Site Visited: 2

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes | 38. Date of Denial | 39. Date Re-Entered | 40. Date Re-Denied | 41. Date Re-Entered

42. **Optional Information**

Type	ID	Value	Type	ID	Value
N	I	244025			

43. Total Entries

Closed Case 44 a. ☐ Close b. ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box
- a. ☐ Establishment Not Found
- b. ☐ Employer Out of Business
- c. ☐ Process To Be Inspected Not Active
- d. ☐ Ten or Fewer Employees
- e. ☐ Denied Entry
- f. ☐ SIC Not on Planning Guide
- g. ☐ Worksite Exempt Through Voluntary Program
- h. ☐ Non-Exempt Consultation in Progress
- i. ☐ Other

46. Closing Conference Date (On Site)

47. CSHO Signature: Michele Valero Date: 1/5/85

48. Reviewer Signature Date

OSHA-1 (Rev. 1/84)

AREA OFFICE COPY

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

3. [illegible] Report Number

4. Inspection Number identifies this inspection ▶ **2440345**

[illegible] 271

5. [illegible] [illegible] Type Number Satisfied ☐S ☐H

6. Total Entries

7. [illegible] ✗ If yes, enter ▶ Type Number

8. [illegible] Masonry Inc.

[redacted]

10. [illegible]

11. City Code: 5520

12. County Code: 121

13. [illegible]

14. Telephone Number: 817/589-2931

15. [illegible]

16. Telephone Number (Site)

Ownership 17. ✗

[redacted]

Inspection Opening 19. ✗

20. Opening Conference Date: 1-5-88

Inspection Category 21. ✗

22. Primary SIC: 1741

23. Secondary SIC
a. Guide

[redacted]

Inspection Type 24.
Unprogrammed ✗
Programmed

25. **Inspection Classification** (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c. ☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information 26. 1
27. 1
28. Number of Employees Controlled by Employer: 25
29. a. ☐ Union b. ☒ Non-Union
30. a. ☐ Employee Exercised Walkaround Privilege?

[redacted]

OSHA-200 Data 31.
32. ✗
33. LWDI Rate

(9) (10) (11) (12) (13)

34\.

Scope of Inspection 35. ✗ ☐ No Inspection

36. Number of Days Site Visited: 2

Warrant Information 37.
38\.
39. Date Re-Entered
40. Date Re-Denied
41. Date Re-Entered

42. Optional Information
Type Value
[illegible] 1 2440238

43. Total Entries

Closed Case 44. 45.
d. ☐ Ten or Fewer Employees
e. ☐ Denied Entry
f. ☐ Not on Planning Guide
g. ☐ Worksite Exempt Through Voluntary Program
h. ☐ Non-Exempt Consultation in Progress
i. ☐ Other

46. Closing Conference Date (On Site)

47. [illegible] Date 1/28
48. Reviewer's Signature [illegible] Date 1/?/88

OSHA-1 (Rev. 1/84)

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

MOD Date	1. Reporting ID 626200	2. CSHO ID V6264	3. Optional Report Number 281	4. Inspection Number (identifies this inspection) ▶ **2440246**

5. Related Activity/Activity Satisfied: 5.1 Type / Number C 121116 231 / Satisfied ☐ S ☐ H; 5.2 Type / Number / Satisfied ☐ S ☐ H; 5.3 Type / Number / Satisfied ☐ S ☐ H

8. Total Entries

7. Previous Activity: Has there been previous activity at this establishment? ☐ Yes ☒ No — If Yes enter ▶ Type Number

8. a. ☐ Change? b. Establishment Name: Deck Elevator Company

[redacted]

10. a. ☐ Change? b. Site Address (Street, City, State, Zip): [illegible] Northwest Hwy, [illegible], [illegible], TX [illegible]

11. City Code: 5820

12. County Code: 121

13. Mailing Address (if different) (Street, City, State, Zip): [illegible], PA 15241

14. Telephone Number: 214/621-1400

15. Name of Controlling Corporation, Partner or Owner:

16. Telephone Number (Site):

Ownership 17. a. ☒ Private Sector c. ☐ State Government b. ☐ Local Government d. ☐ Federal Agency Code

[redacted]

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No

20. Opening Conference Date: 1/5/88

Inspection Category 21. Mark "X" in one box: ☐ Safety ☒ Health

22. Primary SIC: 1796

23. Secondary SIC — a. Guide [redacted]

Inspection Type 24. Mark "X" in one box

Unprogrammed
a. ☐ Fatality/Catastrophe
b. ☐ Complaint
c. ☐ Referral
d. ☐ Monitoring
e. ☐ Variance
f. ☐ Follow-up
g. ☒ Unprogrammed Related

Programmed
h. ☐ Planned
i. ☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☒ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c. ☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information

26. Number of Employees Employed in Establishment	27. Number of Employees Covered by Inspection	28. Number of Employees Controlled by Employer	29.	30.
4	4	500	a. ☐ Union b. ☒ Non-Union	a. ☐ Employee Exercised Walkaround Privilege? [redacted]

OSHA-200 Data (by Data for ... complete year)
31. Year
32. ☒ Data Not Available
33. LWDI Rate

34. Occupational Injury Cases / Occupational Illness Cases (7) (a) (b) (c) (d) (e) (f) (g) (8) (9) (10) (11) (12) (13)

Scope of Inspection 35. Scope (Mark "X" in one box): a. ☐ Comprehensive Inspection b. ☐ Partial Inspection c. ☐ Records Only Inspection d. ☐ No Inspection

36. Number of Days Site Visited: 2

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes | 38. Date of Denial | 39. Date Re-Entered | 40. Date Re-Denied | 41. Date Re-Entered

42. **Optional Information**

Type	ID	Value	Type	ID	Value
N	1	2440235			

43. Total Entries

Closed Case
44. a. ☐ Closed b. ☐ No Citations Issued

45. If no inspection conducted, mark "X" in one box
a. ☐ Establishment Not Found
b. ☐ Employer Out of Business
c. ☐ Process To Be Inspected Not Active
d. ☐ Ten or Fewer Employees
e. ☐ Denied Entry
f. ☐ SIC Not on Planning Guide
g. ☐ Worksite Exempt Through Voluntary Program
h. ☐ Non-Exempt Consultation in Progress
i. ☐ Other

46. Closing Conference Date (On Site)

47. CSHO Signature: Michele Vallen Date: 1/5/88

48. Reviewer Signature Date: 1/6/88

OSHA-1 (Rev. 1/84)

Inspection Report

U.S. Department of Labor
Occupational Safety and Health Administration

A [illegible]

MOD Date	1. Reporting ID 426300	2. CSHO ID V6264	3. Optional Report Number 2 -	4. Inspection Number (Identifies this Inspection) ▶ **2440303**

5. Related Activity/Activity Satisfied: 5.1 Type C Number [illegible] Satisfied ☐ S ☐ H; 5.2 Type Number Satisfied ☐ S ☐ H; 5.3 Type Number Satisfied ☐ S ☐ H
6. Total Entries

7. Previous Activity
Has there been previous activity at this establishment? ☐ Yes ☒ No   If Yes enter ▶ Type Number

8. a ☐ Change? b. Establishment Name: [illegible] Engineered Foam Company
9. [illegible]

10. a ☐ Change? b. Site Address (Street, City, State, ZIP): [illegible]
11. City Code: 5520
12. County Code: 121

13. Mailing Address (if different) (Street, City, State, ZIP): [illegible]
14. Telephone Number

15. Name of Controlling Corporation, Partner, or Owner
16. Telephone Number (Site)

Ownership 17. a ☒ Private Sector b ☐ Local Government c ☐ State Government d ☐ Federal Agency Code
18. [illegible]

Inspection Opening 19. Was Advance Notice Given? ☐ Yes ☒ No
20. Opening Conference Date: 1-5-88

Inspection Category 21. Mark "X" in one box: ☐ Safety ☒ Health
22. Primary SIC: 1177
23. Secondary SIC a. Guide

Inspection Type 24. Mark "X" in one box

Unprogrammed
a ☐ Fatality/Catastrophe
b ☐ Complaint
c ☐ Referral
d ☐ Monitoring
e ☐ Variance
f ☐ Follow-up
g ☒ Unprogrammed Related

Programmed
h ☐ Planned
i ☐ Programmed Related

25. **Inspection Classification** (Mark all that apply)
a. Safety Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
b. Health Planning Guide ☐ Manufacturing ☐ Construction ☐ Maritime
c. ☐ Local Emphasis Program (specify)
d. ☐ National Emphasis Program (specify)
e. ☐ Migrant Farmworker Camp

Employee Information
26. Number of Employees Employed in Establishment: 142
27. Number of Employees Covered by Inspection: 140
28. Number of Employees Controlled by Employer: 200
29. a ☐ Union b ☒ Non-Union
30. a ☐ Employee Exercised Walkaround Privilege? b. ☐ Employees Interviewed? (States Only)

OSHA-200 Data
31. Year
32 ☒ Data Not Available
33. LWDI Rate
34. Occupational Injury Cases; Occupational Illness Cases (1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) (13)

Scope of Inspection 35. Scope (Mark "X" in one box): a ☒ Comprehensive Inspection b ☐ Partial Inspection c ☐ Records Only Inspection d ☐ No Inspection
36. Number of Days Site Visited: 2

Warrant Information 37. Anticipatory Warrant/Subpoena Served ☐ Yes
38. Date of Denial
39. Date Reattempted
40. Date Re-Denied
41. Date Re-Entered

42. **Optional Information**

Type	ID	Value	Type	ID	Value
N	1	2440253			

43. Total Entries

Closed Case
44 a ☐ Closed b ☐ No Citations Issued
45. If no inspection conducted, mark "X" in one box:
a ☐ Establishment Not Found
b ☐ Employer Out of Business
c ☐ Process To Be Inspected Not Active
d ☐ Ten or Fewer Employees
e ☐ Denied Entry
f ☐ SIC Not on Planning Guide
g ☐ Worksite Exempt Through Voluntary Program
h ☐ Non Exempt Consultation in Progress
i ☐ Other
46. Closing Conference Date (On Site)

47. CSHO Signature   Date [illegible]
48. Reviewer Signature   Date [illegible]

OSHA-1 (Rev. 1/84)

Inspection Report

U.S. Department of Labor

4 ▶ 2440329

6. Total Entries

9. Employer ID (State's option)

11. City Code 5820

12. County Code 101

14. Telephone Number 214/536-1415

16. Telephone Number (Site)

Ownership 17 ☒

18. Legal Entity (Optional) a ☐ Corporation b ☐ Partnership c ☐ Sole Owner

Inspection Opening 19 ☒

20. Opening Conference Date 1 5 8?

Inspection Category 21 ☒

22. Primary SIC

23. Secondary SIC

a. Guide

Inspection Type 24

25. Inspection Classification (Mark all that apply)

Unprogrammed

☐ Manufacturing ☐ Construction ☐ Maritime

☐ Manufacturing ☐ Construction ☐ Maritime

☒

Programmed

Employee Information 26 27 28 29 a ☐ Union b ☒ Non-Union

30. a ☐ Employee Exercised Walkaround Privilege?

b ☐ Employees Interviewed (States Only)

OSHA-200 Data 31 32 ☒

33. LWDI Rate

34. (9) (10) (11) (12) (13)

Scope of Inspection 35 a ☒ b ☐ c ☐ Records Only d ☐ No Inspection

36. Number of Days Site Visited 2

Warrant Information 37. 38. 39. 40. Date Re-Denied 41. Date Re-Entered

42. Optional Information

Type	ID	Value	Type	ID	Value
A	1	2441225			

43. Total Entries

Closed Case 44 a ☐ b ☐ No Citations Issued

45. If no inspection conducted (mark X in one box)

a ☐ Establishment Not Found d ☐ Ten or Fewer Employees g ☐ Worksite Exempt Through Voluntary Program

b ☐ Employer Out of Business e ☐ Denied Entry h ☐ Non-Exempt Consultation in Progress

c ☐ Process To Be Inspected Not Active f ☐ SIC Not on Planning Guide ☐ Other

46. Closing Conference Date (On Site)

47. CSHO Signature Date

48. Reviewer Signature Date

OSHA-1 (Rev. 1/84)

Ms. VALLON. Yes, sir.

The CHAIRMAN. So the two of you accounted for 50 inspections; is that right?

Ms. VALLON. Yes, sir.

The CHAIRMAN. Can you do 25 thorough health inspections in three days?

Ms. VALLON. No, sir.

The CHAIRMAN. So it is really somewhat of a sham, isn't it?

Ms. VALLON. Yes, sir.

The CHAIRMAN. Do you think it is a proper way to conduct inspections?

Ms. VALLON. Definitely not.

The CHAIRMAN. Do you think it is a proper utilization of your training and education and professional background?

Ms. VALLON. No.

The CHAIRMAN. Did the same safety inspector visit the same construction project earlier at a site across the road accompanied by an industrial hygienist trainee on November 24th, 1987?

Ms. VALLON. Yes, sir.

The CHAIRMAN. And was that inspection also conducted in a way to double the numbers?

Ms. VALLON. Yes, sir.

The CHAIRMAN. How do you know that?

Ms. VALLON. Well, after they came back from the inspection, it was discussed. And at the time the compliance officer was a—the health compliance officer was a trainee.

And after that inspection, because so many OSHA-1's were generated, it was suggested strongly that this compliance officer become—be able to do inspections on their own.

That way, they would be able to get both the—the health compliance officers with 15 inspections, and safety compliance officers with 15 inspections.

The CHAIRMAN. As I mentioned, in that inspection there was an industrial hygienist trainee that was involved; is that correct?

Ms. VALLON. Yes, sir.

The CHAIRMAN. And are they allowed to do inspections?

Ms. VALLON. No, sir.

The CHAIRMAN. Was the trainee made operational so that her inspection numbers could be counted?

Ms. VALLON. Yes, sir.

The CHAIRMAN. What does operational mean?

Ms. VALLON. That means that the trainee can then do inspections on their own; they don't need to go out with the higher compliance officer, a higher grade compliance officer.

The CHAIRMAN. And how long are you supposed to serve as a trainee before you become an operational industrial hygienist?

Ms. VALLON. According to the paperwork, a year.

The CHAIRMAN. And how many inspections did she account for?

Ms. VALLON. On that site, 15.

The CHAIRMAN. And the safety inspector had the same number; is that right?

Ms. VALLON. Yes, sir.

The CHAIRMAN. On September 30, 1987, was the same safety inspector sent to the same construction project at a different site, accompanied by another industrial hygienist?

Ms. VALLON. Yes, sir.

The CHAIRMAN. Was that at the end of the fiscal year?

Ms. VALLON. Yes, sir.

The CHAIRMAN. Were they also sent out for the same reason, to double the numbers?

Ms. VALLON. Yes, sir.

The CHAIRMAN. And how do you know that?

Ms. VALLON. I overheard a conversation, and this was discussed that it was on September 30, and since that was the end of the fiscal year, in order to—and the office was low on numbers for that year, what they did is, they sent the compliance officers out and they generated double the amount of OSHA-1's, and started the inspection following that.

The CHAIRMAN. When a company is cited for a violation, followup inspections are done to ensure there is abatement of the violation; is that correct?

Ms. VALLON. They're supposed to be.

The CHAIRMAN. And how is that handled?

Ms. VALLON. Well, I have not done many followup inspections since my time with OSHA. For one thing, it takes up too much time. And we just have other places that we have to go.

Usually, normally, we don't do many followups.

The CHAIRMAN. Are most citations settled in informal conferences between the area director and the company?

Ms. VALLON. I'd say a good part of them, yes.

The CHAIRMAN. And do you attend any of these conferences?

Ms. VALLON. I have been to one.

The CHAIRMAN. Do you think you should?

Ms. VALLON. Yes, definitely.

The CHAIRMAN. What is a record check inspection?

Ms. VALLON. We don't do—we health compliance officers don't really do record check inspections. We do an inspection whether or not the records are—if the company is below the average or above the average, it doesn't matter, we still do the inspection.

The CHAIRMAN. Ms. Vallon, did you receive a call over last weekend from an industrial hygienist you know who is now assigned to the OSHA area office in Oklahoma City?

Ms. VALLON. Yes, I did.

The CHAIRMAN. Did he say that he understood you were coming to Washington to testify, and wanted to tell you about a recent experience of his?

Ms. VALLON. Yes, he did.

The CHAIRMAN. Did he say you could use his name?

Ms. VALLON. Yes. He said that was okay.

The CHAIRMAN. And what is his name?

Ms. VALLON. His name is Landis Powell, Dr. Landis Powell.

The CHAIRMAN. Dr. Landis Powell. Did he formerly work in the Irving office?

Ms. VALLON. No, he didn't. He didn't work there.

The CHAIRMAN. How did you know him?

Ms. VALLON. He handled a case for me.

The CHAIRMAN. Did he tell you he was conducting a health inspection as a result of a Congressional request at the Tinker Air Force Base in Oklahoma City?

Ms. VALLON. Yes, he did.

The CHAIRMAN. And what did he say was the reason for the Congressional request?

Ms. VALLON. Well, there were employees that were getting ill. There were several cancer cases. And they were quite concerned. So he was sent out on the investigation.

But he was also being rushed through it because there were other inspections that were done.

The CHAIRMAN. All right. Did he say he received instructions from his superiors concerning the inspection he was conducting?

Ms. VALLON. Not exactly. It was just he was receiving pressure to complete the inspection.

The CHAIRMAN. Do you remember, to the best of your ability, what he told you that led him to believe that he was to rush through the inspection?

Ms. VALLON. Well, he just told me that the office was pushing him to get through it because they had numbers to get.

The CHAIRMAN. They had numbers to get. Okay.

Let us go to Dr. Barry.

Dr. BARRY. I am the regional industrial hygienist for the Philadelphia regional office of OSHA.

The CHAIRMAN. And what is your educational background?

Dr. BARRY. I have a bachelor's degree, and I have a master's degree in environmental health, and I have a doctor's degree in industrial hygiene engineering.

The CHAIRMAN. How long have you been with OSHA?

Dr. BARRY. I've been with OSHA 12 years, Senator.

The CHAIRMAN. And I understand your wife was also an industrial hygienist with OSHA until January of this year; is that correct?

Dr. BARRY. That is correct.

The CHAIRMAN. How long was she with OSHA?

Dr. BARRY. She was with OSHA about 9 or 10 years.

The CHAIRMAN. Is there a numbers game in your region of OSHA?

Dr. BARRY. Yes, there is.

The CHAIRMAN. Is there constant pressure on inspectors to produce numbers of inspections?

Dr. BARRY. There is.

The CHAIRMAN. Is there a quota of the number of inspections which each industrial hygienist in your region is expected to complete each month?

Dr. BARRY. There are proposed quotas each year. They vary from year to year.

The CHAIRMAN. What is the number for the current fiscal year?

Dr. BARRY. The current fiscal year I believe is 42 to 46 inspections per hygienist.

The CHAIRMAN. How do you know that?

Dr. BARRY. It was mentioned in a conference call that I sat in on this summer, and also, it was brought up at the regional managers' retreat in Lancaster last October.

The CHAIRMAN. Can you describe that meeting?

Dr. **Barry**. The managers' meeting, Senator?

The **Chairman**. Yes.

Dr. **Barry**. Yes, Mr. Pendergrass, the head of OSHA, was present, and one of the speakers, and after his presentation, he had a question and answer period, and the health supervisor or the hygiene supervisor in the Pittsburgh area office stood up and asked the question of Mr. Pendergrass as to how he was supposed to motivate his staff when they were on the treadmill to generate inspection numbers.

And Mr. Pendergrass really did not answer the question but rather just made a cursory remarks that whatever indicators would be given, that he was sure the regional administrator would follow through on them.

The **Chairman**. That was his response?

Dr. **Barry**. Correct.

The **Chairman**. So how many inspections is that a month?

Dr. **Barry**. It works out to about one a week, because there are 52 weeks in a year, and you figure that the typical Federal employee has four weeks of vacation, and normally, we schedule two weeks for training. So six from 52 gives you 46. So if you take the higher number of 46, that is approximately one inspection a week for a hygienist who is not a trainee.

The **Chairman**. Now is it possible for an industrial hygienist to do that thoroughly?

Dr. **Barry**. No. You could not sustain that performance. If you do very isolated—a few inspections could be done that quickly that are very trivial, like complaints that have no merit.

But if you go to a plant or a construction site that has any significant problems, it would be impossible to do a thorough inspection in a week.

The **Chairman**. Does that mean that the result is quantity at the result of quality?

Dr. **Barry**. Basically that is what is going on, to generate volume rather than quality.

The **Chairman**. Do you think the compliance policy of inspecting only the subject of the complaint is adequate?

Dr. **Barry**. Could you rephrase the question?

The **Chairman**. Yes, do you think that the complaint policy of inspecting only the subject of the complaint is adequate?

Dr. **Barry**. I don't, because many times the complaints do not reflect the true hazards of the workplace. We have a real problem with worker education in that many workers do not recognize the true hazards.

And if we limit the hygienist or even the safety professional to whatever the complainant has complained about, I think we are doing a disservice to the American working public.

The **Chairman**. What did the policy previously provide?

Dr. **Barry**. Previously, when we had a complaint, we normally did a full scope or a wall-to-wall inspection, which means that if you went to a manufacturing plant, we would look at all aspects of the operation, not just the item or items that the complainant had complained about.

The **Chairman**. Do you think that previous policy was better?

Dr. **Barry**. It is certainly better than the policy we are working under today.

The **Chairman**. Are formal complaints encouraged?

Dr. **Barry**. No, formal complaints are discouraged. There are two types of complaints. You can have a formal complaint, and you can have nonformal complaints.

A formal complaint is when an employee or a union representative writes down a complaint and identifies himself, I'm John Smith, I work in such and such a plant, and this is the problem. The employee must also sign the complaint for it to be formal.

Those types of complaints we are under current policy obliged to do inspections addressing the complaint, and it is at the discretion of the supervisor and the inspectors as to whether they wish to enlarge the scope or not.

The nonformal complaints, where either the union doesn't want to put it in writing, and the employee either doesn't want to put it in writing or wants to remain anonymous for reasons, for fear of reprisal or something, what we do is we send a letter inspection. We send a letter to the employer saying we have received a complaint about such and such a matter in your work place. Please advise us as to its merits and to what corrective action you have taken if there is a problem.

And we only do followup inspections on those complaints where either the employer is nonresponsive, or through just a statistical checking every so many nonformal complaints we inspect just for followup procedure.

The **Chairman**. Let me just go into this area for a few moments. Is noise-induced hearing loss the leading affliction affecting the workers?

Dr. **Barry**. It is the most prevalent health hazard in the country today. Unlike some of the other hazards that the people in health standards addressed earlier this morning, you find noise in every work place, construction sites, shipyards, farms, mines, general industry, even in financial institutions.

The **Chairman**. Is the noise standard adequate to address the basic problem?

Dr. **Barry**. No, it is not.

The **Chairman**. Was the noise standard adopted by OSHA in 1971 from the 1969 Walsh-Healy noise standard?

Dr. **Barry**. Yes, the standard we are currently enforcing in OSHA and in our sister agency MSHA was adopted from the Walsh-Healy noise standard, which came about in May of 1969.

The **Chairman**. And what was the basic provisions of that standard?

Dr. **Barry**. The basic provisions are that you cannot expose workers to noise greater than 90 decibels measured on the A scale of a standard sound level meter for more than 8 hours, and it allows increases in sound level of 5 decibel steps for each halving of the duration.

So in other words, you could expose a worker to 95 decibels for four hours, 100 decibels for two hours, up to 115 decibels for 15 minutes.

Any exposure above that required mandatory hearing protection which would reduce the employees' exposure to within the permitted levels; and it also required that all feasible engineering and administrative controls be implemented to reduce the exposure to within the permitted levels or to as low as would be feasible for the work place.

And then the last aspect of the standard required that the people overexposed be included in a continuing effective hearing conservation program.

The CHAIRMAN. What percentage of the workers are covered by that standard?

Dr. BARRY. I would say—well, we have two noise standards. We have the general industry noise standard, and we have a construction noise standard.

The construction standard applies only to construction. The two standards are identical except for the hearing conservation part.

The general industry standard is binding in general industry and maritime; it's not binding in agriculture. So agricultural workers are not covered by the noise standard.

The CHAIRMAN. Did the Carter Administration attempt to improve the coverage and scope of the standard by publishing a hearing conservation amendment in January of 1981?

Dr. BARRY. They did.

The CHAIRMAN. Okay. Now, did the Reagan Administration stay the implementation of the amendment shortly thereafter?

Dr. BARRY. They did. The standard came out in the last several days of the Carter Administration. It was stayed almost immediately after the current Administration took office.

The CHAIRMAN. How long was the stay in effect?

Dr. BARRY. The stay was in effect until May of 1983, when the amended hearing conservation amendment was adopted.

The CHAIRMAN. And how did it compare with the amendment published and then stayed two years earlier?

Dr. BARRY. Basically what it did was it gutted all the important aspects of the hearing conservation program, the most significant one being the followup procedures to determine if—if you found in the course of doing hearing testing that workers were losing their hearing, the original standard of 1981 would have required an employer to ascertain why his employees were becoming hard of hearing and take appropriate measures to correct the situation.

The CHAIRMAN. Now, was a compliance directive issued in 1984 which further deleted the standard?

Dr. BARRY. There was.

The CHAIRMAN. Well, and did it raise the noise level for enforcement of the standard from the 90 decibels to the 100 decibels?

Dr. BARRY. It changed the enforcement policy of the standard that between 90 and 100 decibels we would not enforce engineering controls which are required by the standard.

The CHAIRMAN. Is that a significant rise in the noise level?

Dr. BARRY. It is. The decibel scale is exponential or logarithmic, so a three decibel increase is doubling the amount of noise.

The CHAIRMAN. So it is significant?

Dr. BARRY. It is. It would be a 20-fold increase.

The CHAIRMAN. 20-fold increase? What would be some examples of a work site with a noise volume in 100 decibels?

Dr. BARRY. Well, a newspaper press room, when you were operating at maximum press speed, would be in the range of 98 to 106 decibels.

The weaving room in a textile mill.

The CHAIRMAN. All right. Very helpful. Again, we want to thank all three of you for your testimony, and for your responses.

We are going to take a very brief recess here for just a few moments, and then we will return for our final panel.

[Brief recess.]

The CHAIRMAN. We will come to order.

For our final panel this morning, we have Mrs. Jackie Snyder, Alliquippa, Pennsylvania; Mrs. Eloise Simon, Rochester, Pennsylvania; Mrs. Eileen Paumier, North Canton, Ohio; Mr. Dennis Herlyn, Parker, South Dakota; Mr. David Kellen, Sioux Falls, South Dakota; Mrs. Mary Wall, Roslindale, Massachusetts; and Mrs. Juanita Cox, San Juan, Texas.

I want to first of all welcome all of you here to the Committee. I know this is probably the first time you have ever had a chance to appear in a circumstance like this, and we hope that you will be relaxed. It is always difficult, I know, for anyone to talk about health problems in a family. That has certainly been true about my family, and I am sure it is about all of yours. And we know in telling the story, you revisit some very painful experience, and that, I know, is a trying and a difficult circumstance.

You have had a chance during the course of the morning, perhaps, to hear some of the witnesses talk, and we heard yesterday some other witnesses speak about the OSHA agency and how it is really failing to provide for the protection of workers. And when all is really said and done, we are really talking about human beings—we are talking about fathers, we are talking about husbands, we are talking about children, grandparents, whatever. But when it is all said and done, it is a question of whether we are really providing the kind of protection to Americans which the Congress, the Senate and a former President believe that we should.

I know you have got some important stories to tell us, and we want to also give you the assurance that this is not really the end of the road. This is really the beginning. We are going to continue to insist that the agency do its job. And your telling your stories so that we can share this with the other members of the Committee and share it with our colleagues is going to be extremely important in terms of making sure that that happens.

So with those brief comments, we want to again welcome you here and thank you very much for being with us.

Mrs. Snyder and Mrs. Simon, I will start with you.

STATEMENTS OF JACKIE SNYDER, ALLIQUIPPA, PA; ELOISE SIMON, ROCHESTER, PA; EILEEN PAUMIER, NORTH CANTON, OH; DENNIS HERLYN, PARKER, SD; DAVID KELLEN, SIOUX FALLS, SD; MARY WALL, ROSLINDALE, MA, AND JUANITA COX, SAN JUAN, TX

The CHAIRMAN. Mrs. Snyder, where do you live?

Mrs. SNYDER. Alliquippa, Pennsylvania.

The CHAIRMAN. And Mrs. Simon?

Mrs. SIMON. Rochester, Pennsylvania.

The CHAIRMAN. Do you both have children?

Mrs. SNYDER. Yes; I have three.

Mrs. SIMON. I have two children.

The CHAIRMAN. And how old are they?

Mrs. SNYDER. Ten, nine, and three.

Mrs. SIMON. My daughter is ten, and my son is fourteen.

The CHAIRMAN. And I understand that both your husbands died in the same confined space accident at their workplace; is that right?

Mrs. SNYDER. Yes.

Mrs. SIMON. Yes.

The CHAIRMAN. Mrs. Snyder, what company were they working for at the time?

Mrs. SNYDER. Saint Joe Resources.

The CHAIRMAN. And was it a zinc processing plant?

Mrs. SNYDER. Yes, sir.

The CHAIRMAN. And Mrs. Snyder, when did the accident happen?

Mrs. SNYDER. July 24, 1985.

The CHAIRMAN. And how old were your husbands—Mrs. Simon, and then Mrs. Snyder—at the time?

Mrs. SIMON. My husband was 36 at the time.

Mrs. SNYDER. My husband was 33.

The CHAIRMAN. And Mrs. Snyder, what was your husband's job?

Mrs. SNYDER. He was an operator in a zinc dust department.

The CHAIRMAN. And as I understand, Mrs. Snyder, your husband was working on the night shift and was assigned a job of cleaning out the bottom of a condensor, is that correct?

Mrs. SNYDER. Yes.

The CHAIRMAN. Was the only opening in the condensor a small entry hole at the top?

Mrs. SNYDER. Yes, as far as I know.

The CHAIRMAN. And I understand he climbed down a ladder and was picking up the chunks of zinc and slag, which he would hand out through the hole after climbing back up the ladder, and hand them to an elderly worker who was outside the condensor; is that correct?

Mrs. SNYDER. Yes.

The CHAIRMAN. And when your husband entered the condensor, was there a supervisor there?

Mrs. SNYDER. No.

The CHAIRMAN. And was the elderly worker the only other person in the area from what you have learned?

Mrs. SNYDER. Yes.

The CHAIRMAN. And had the condensor been tested for carbon monoxide before your husband entered it?

Mrs. SNYDER. As far as I understood, it was.

The CHAIRMAN. It was not. And did he have a respirator or an airpack on?

Mrs. SNYDER. No, he did not.

The CHAIRMAN. Had he had any training for this job?

Mrs. SNYDER. No.

The **Chairman**. Did another worker, who was off work because of injuries, usually do that job?

Mrs. **Snyder**. Not that I know of.

The **Chairman**. Well, was there another worker, evidently, who was——

Mrs. **Snyder**. Oh, who was hurt at that time? Yes.

The **Chairman**. Yes. There was another worker who was hurt, who I understand usually does that job.

Mrs. **Snyder**. Oh, yes, sir.

The **Chairman**. He was off, so your husband was called in to do this particular job; is that correct?

Mrs. **Snyder**. Yes, sir.

The **Chairman**. And I understand that while your husband was cleaning out the condensor, he was overcome by carbon monoxide and collapsed; is that correct?

Mrs. **Snyder**. Yes.

The **Chairman**. And, Mrs. Simon, did the elderly worker then go out looking for help?

Mrs. **Simon**. Yes.

The **Chairman**. Where was your husband at the time?

Mrs. **Simon**. He was about three departments down.

The **Chairman**. What did he do when he heard the call for help?

Mrs. **Simon**. He immediately went up to see what the problem was.

The **Chairman**. He volunteered and tried to rescue Mr. Snyder; is that correct?

Mrs. **Simon**. Yes. At the time he was eating his lunch.

The **Chairman**. Eating his lunch.

Mrs. **Simon**. Yes.

The **Chairman**. And he went to try and help the fellow worker who was calling for help. Did he find an airpack to wear?

Mrs. **Simon**. There was an airpack at the front of the entrance. When he went to put it on, he could not fit through the opening with the airpack on.

The **Chairman**. The entry was too small for him to go into the condensor wearing the airpack, was it not?

Mrs. **Simon**. Yes.

The **Chairman**. So what did he do?

Mrs. **Simon**. He handed the airpack to someone and told them to hold it until he got inside. As soon as he was inside, he was overcome with the gases.

The **Chairman**. I understand the rescue squad arrived a few minutes later and revived both of them?

Mrs. **Simon**. They just revived my husband.

The **Chairman**. They took both of them out; is that correct?

Mrs. **Simon**. Pardon me?

The **Chairman**. They took both of the men out of the container?

Mrs. **Simon**. Yes, they did.

The **Chairman**. Mrs. Snyder, was your husband dead on arrival at the hospital?

Mrs. **Snyder**. Yes.

The **Chairman**. Mrs. Simon, how long did your husband live?

Mrs. **Simon**. Until the next day.

The CHAIRMAN. And so, Mrs. Snyder, your husband died suddenly because he was assigned to a dangerous job which someone else usually did and without training or any protective equipment and without a test for carbon monoxide having been made and with no supervisor present.

Mrs. SNYDER. Yes.

The CHAIRMAN. Mrs. Simon, your husband died because he just happened to be in another department, eating his lunch, and heroically responded to the call for help to save another man's life.

It is very sad that this type, or any accident like this can happen and that a rescuer as well as the worker would die.

Mrs. Snyder, had your husband expressed any concern about safety in the plant?

Mrs. SNYDER. Yes.

The CHAIRMAN. Had he taken out additional life insurance?

Mrs. SNYDER. Yes.

The CHAIRMAN. Do you think the accident could have been prevented?

Mrs. SNYDER. Yes, sir, I do.

The CHAIRMAN. Has this whole accident had a traumatic effect on your children?

Mrs. SNYDER. Yes.

The CHAIRMAN. And on yours, Mrs. Simon?

Mrs. SIMON. Yes, it has.

The CHAIRMAN. OSHA has been in the process of developing a comprehensive confined space standard for over 13 years. Both of your husbands died in a confined space. I imagine both of you believe that if they had some kind of standard that these deaths might not have occurred.

I imagine you would certainly want some standards developed so this did not happen to others. Would I be safe in concluding that?

All right. Thank you.

Mrs. Paumier, where do you live?

Mrs. PAUMIER. I live in North Canton, Ohio.

The CHAIRMAN. I understand you have a 10-year-old daughter; is that correct?

Mrs. PAUMIER. Nine-and-a-half.

The CHAIRMAN. Was your husband killed in 1985 in an accident while at work?

Mrs. PAUMIER. Yes, he was.

The CHAIRMAN. Where was he working at the time?

Mrs. PAUMIER. He was working at Winters Industry.

The CHAIRMAN. Excuse me? Where?

Mrs. PAUMIER. Winters Industry. It is a foundry.

The CHAIRMAN. How long did he work there?

Mrs. PAUMIER. Nineteen years.

The CHAIRMAN. What was his job?

Mrs. PAUMIER. He was a maintenance man.

The CHAIRMAN. Had he complained to you about the safety conditions at the foundry?

Mrs. PAUMIER. He never talked to me about it. He tried to keep everything away from Andrea and I. But he was not real happy at work with what he had to do.

The CHAIRMAN. Could you tell us what happened?

Mrs. PAUMIER. From what they have told me, he was working in an elevator that took things up to the machine, and somebody had turned the machine on when he had it on manual mode. And it crushed him to death.

The CHAIRMAN. So he was crushed by the elevator?

Mrs. PAUMIER. Yes.

The CHAIRMAN. Was the elevator equipped with what we call a lockout device?

Mrs. PAUMIER. No, it was not.

The CHAIRMAN. Would it have made a difference if it had been?

Mrs. PAUMIER. Yes.

The CHAIRMAN. Did the company install such a device the day after your husband was killed?

Mrs. PAUMIER. The day he was killed, 12 hours later.

The CHAIRMAN. Do you think that your husband's death could have been prevented?

Mrs. PAUMIER. Yes.

The CHAIRMAN. Do you think a comprehensive lockout standard would save other lives?

Mrs. PAUMIER. Yes.

The CHAIRMAN. Thank you, Mrs. Paumier. I think if you were here earlier in the day, you noted that my colleague and friend, Senator Metzenbaum, was here and wanted to be here during the course of the hearing. He is over on the floor right now, and he wanted me to say he hopes he will be able to catch up with you before you leave town so he can tell you of his own very deep and continuing interest, not only in your family but also in trying to work to avoid this kind of a situation for anyone else.

Mr. Herlyn, where do you live?

Mr. HERLYN. Outside of Parker, South Dakota.

The CHAIRMAN. How old are you?

Mr. HERLYN. Thirty-eight.

The CHAIRMAN. I understand you are married and have three children?

Mr. HERLYN. Correct.

The CHAIRMAN. What is your occupation?

Mr. HERLYN. Farmer.

The CHAIRMAN. Were you seriously injured in a grain dust explosion?

Mr. HERLYN. Yes.

The CHAIRMAN. When was that?

Mr. HERLYN. November 2, 1985.

The CHAIRMAN. I understand that you had brought a load of grain from your farm to the grain elevator in nearby Marion, South Dakota, and had stopped to make a phone call in the office next to the elevator. Is that right?

Mr. HERLYN. That is correct.

The CHAIRMAN. What happened to you while you were making that call?

Mr. HERLYN. A grain dust explosion occurred. I was trapped under chunks of concrete and grain for three-and-a-half hours.

The CHAIRMAN. The concrete floor you were standing on crumbles and fell with you into the basement, and the falling concrete pinned your legs and you could not move. I guess you still had the phone in your hand; is that right?

Mr. **Herlyn**. That is right.

The **Chairman**. Did others fall into the basement with you?

Mr. **Herlyn**. Yes, but they were blown free of the concrete.

The **Chairman**. They were able to get out?

Mr. **Herlyn**. Right.

The **Chairman**. Were they injured?

Mr. **Herlyn**. Burns.

The **Chairman**. Were you also being buried by falling grains of corn?

Mr. **Herlyn**. Pardon me?

The **Chairman**. Were you also being buried by falling grains of corn?

Mr. **Herlyn**. Correct.

The **Chairman**. Did you think you were going to suffocate?

Mr. **Herlyn**. Yes.

The **Chairman**. How long did it take someone to reach you?

Mr. **Herlyn**. As far as I can recollect, about 20 minutes, I think.

The **Chairman**. How did they go about rescuing you?

Mr. **Herlyn**. At about the time the corn was the level of my mouth and going in my mouth, and I was trying to fight it back, a rescue worker arrived with an airpack. Also, I might add, there was smoke and fire all around me at the same time. It was difficult to breathe.

The **Chairman**. How did they go about rescuing you?

Mr. **Herlyn**. They got down there and started—I think, as far as I can remember—started plugging holes or whatever they could find to hold back the corn that was constantly trying to cover all of us up. They finally got that stopped and then started digging. They had a bucket brigade of corn up out of the basement to uncover me, to finally get down to my legs to find out the problem.

The **Chairman**. How long did that take?

Mr. **Herlyn**. I do not know. Ten to 15, 20 minutes, I guess.

The **Chairman**. What was the condition of your legs when you were rescued?

Mr. **Herlyn**. My left leg was severely fractured, bones and arteries, and my right was totally crushed right below the knee.

The **Chairman**. Was your leg amputated below the knee at the hospital?

Mr. **Herlyn**. Correct.

The **Chairman**. And there was surgery on your other leg?

Mr. **Herlyn**. Right.

The **Chairman**. How long were you in the hospital?

Mr. **Herlyn**. Totally, ten weeks over a three-and-a-half month period.

The **Chairman**. Did you have therapy after that?

Mr. **Herlyn**. Yes.

The **Chairman**. When were you able to walk again?

Mr. **Herlyn**. Unaided, nearly a year. Ten months to a year without the aid of a cane.

The **Chairman**. Were there men also killed in the explosion?

Mr. **Herlyn**. Yes. Three men were killed.

The **Chairman**. Have there been a number of grain dust explosions in the area over the years?

Mr. **Herlyn**. Yes.

The **Chairman**. Did you ever think it might have happened to you?

Mr. **Herlyn**. Not at all.

The **Chairman**. I understand you are now back farming again and bringing grain to the elevator again.

Mr. **Herlyn**. That is correct.

The **Chairman**. What is it like going back there?

Mr. **Herlyn**. The first load a year after the accident was an overcoming feeling.

The **Chairman**. Do you think there should be a safety standard to prevent the kind of explosion you experienced?

Mr. **Herlyn**. Absolutely.

The **Chairman**. Mr. Kellen, are you an employee of the John Morrell meat packing plant in Sioux Falls, South Dakota?

Mr. **Kellen**. Yes, I am.

The **Chairman**. How long have you been employed there?

Mr. **Kellen**. I have been there 17 years.

The **Chairman**. When you first went to work there, what was your job?

Mr. **Kellen**. When I first started in 1971, I was in the beef byproducts, and it was the chiseling of beef heads. From there I went into the hog slaughtering division.

The **Chairman**. Bring that mike just up tight.

Mr. **Kellen**. Okay. When I was first employed, I was put into the beef division. After about three, four years, I went into the hog slaughtering division.

The **Chairman**. What did that involve?

Mr. **Kellen**. Okay. The job that I had in hog slaughtering was pulling of leaf lard, and it is a job that requires a tremendous amount of gripping and pulling and pressure on your hand.

The **Chairman**. What do you do? Do you tear that?

Mr. **Kellen**. You are actually doing this gripping leaf lard that is on the inside of the carcass of a hog, the animal that is coming by, and you are gripping and pulling. You are making a rotation with your wrist. You are doing this constantly all day, and you are pulling up towards your chest, and you are doing like an arm curl like when you lift weights. You are doing this consistently all day long.

The **Chairman**. So did it require considerable tension on your arms and hand?

Mr. **Kellen**. Right. A lot of people lose their fingernails and thumbnails over the job because there is a tremendous amount of pressure that they have when they pull this leaf lard.

The **Chairman**. How fast did the hog section come by?

Mr. **Kellen**. This varied in time. In the years when I first started, it was somewhere around 660 an hour, and in May 1987 the speed was 1,060 an hour.

The **Chairman**. What is 660 an hour? How many hogs would that be?

Mr. **Kellen**. Okay, 660 hogs per hour.

The **Chairman**. Per hour?

Mr. KELLEN. Right. And this was in 1974, I would say 1971 to 1974. Basically when you are pulling this leaf lard, you have to double that amount because there are two halves to each hog. So you are actually getting 1,300. But in May of 1985, or so we were running a speed of 1,060 some head an hour with the same number of people.

The CHAIRMAN. It was 660? Ten a minute?

Mr. KELLEN. Pardon?

The CHAIRMAN. Ten a minute, approximately? Even more than that, when you are going 660?

Mr. KELLEN. We had the same amount of men at that speed as we did at the 1,060 speed.

The CHAIRMAN. Okay. How many workers were at your station?

Mr. KELLEN. How many workers?

The CHAIRMAN. Yes. How many workers were there doing the same thing you were doing?

Mr. KELLEN. Okay. When I was on the job, we had three workers. Now, we did have a fourth person, and this person was on the job at the speed of about 840 an hour, I think, or 740. When I say we had the same amount of men, from the speed of 740 to 840, the company agreed to give us one man, an extra person. So in other words, we had four people, and what I am saying is you have got four people at that speed of 740 to 840. And when they increased it to 1,065, we still had the same amount of lard pullers, workers, up there.

The CHAIRMAN. Well, by 1978, had you developed carpal tunnel syndrome in both hands?

Mr. KELLEN. Yes, I did. And I had surgery in 1979.

The CHAIRMAN. You had surgery on both hands. Did the doctors at the clinic that the company refers its workers to say that you could go back to the same job?

Mr. KELLEN. Right. I had surgery in June and July. One month, I had it in June on my right hand, and then in July I had it on the left hand. The doctor told me that I could go back on the same job, and that carpal tunnel would not occur again in my hand.

The CHAIRMAN. Did you go back?

Mr. KELLEN. Yes, I did. I went back about three weeks after I had about six weeks off the job, and they put me on light duty, and then I was put back up on the same job.

The CHAIRMAN. Then in 1985, did your hands become so painful that you could no longer do that job?

Mr. KELLEN. Right. And it was so painful. Carpal tunnel is a crippling thing, and your hands are numb and asleep. It is this tingling sensation where if you went to read a newspaper or hold a magazine, your hands are numb. Even right now my left hand is numb. And, yes, I went down and complained again to the nurses' station.

The CHAIRMAN. You can feel that now in your left hand?

Mr. KELLEN. Yes. My left hand is tingling numb right now.

The CHAIRMAN. So you were assigned, after that second time that you went back, to a lighter duty?

Mr. KELLEN. Right. I exercised my rights, and I was assigned a job that was like a rehab job. I had that job until 1987, May.

The CHAIRMAN. Did you continue on the lighter duty job until you eventually went out on a sympathy strike in May of 1987?

Mr. KELLEN. Right. Yes, I did.

The CHAIRMAN. Were the jobs of the striking union workers taken over by replacement workers?

Mr. KELLEN. Yes, they were.

The CHAIRMAN. And the strike has since been settled, but most of the union members have not yet been called back to work because of the replacement workers; is that right?

Mr. KELLEN. That is right. The so-called picket lines went down on November 4th.

The CHAIRMAN. Were you and two other union members called back to work in February of this year?

Mr. KELLEN. Right. We were called back February 22nd, and we were told to do this job or that we would be losing our unemployment. So we were forced up there to do the leaf lard pulling, and they had known that my condition was still carpal tunnel. That was diagnosed in 1985, but I still had to go up there and do it.

The CHAIRMAN. When you went back to work, were all three of you assigned to pulling leaf lard, the same job that had originally caused the carpal tunnel syndrome?

Mr. KELLEN. Yes, I believe so. I am still under the doctor's care, and I have to have surgery again. So I would have to weigh that fact to see if the doctor will actually let me go back on that job, because the first doctor said it would not reoccur.

The CHAIRMAN. How long were you able to do the job?

Mr. KELLEN. I was on and off leaf lard pulling, out of my 17 years, probably ten years.

The CHAIRMAN. Were the other workers also suffering painful hand disorders?

Mr. KELLEN. Yes. All my fellow workers, the coworkers that I worked with, had it; this was even in 1978. I have known at least five or six of them that have had carpal tunnel surgeries because of this job.

The CHAIRMAN. I am talking about after you went back.

Mr. KELLEN. Right. On February 22nd, also, the two coworkers that were called back, one was a 42-year-old man, the other a 54-year-old man, and they have never had carpal tunnel before, all the years they worked at Morrell's. And they did result in carpal tunnel syndrome from this job.

The CHAIRMAN. I understand when you returned to work you were given a new assignment which the company considered light duty. Is that right?

Mr. KELLEN. Yes, they did.

The CHAIRMAN. Would you describe that job?

Mr. KELLEN. Okay. When I came back from the doctor, he had a light duty job statement, and the job they had put me on was scooping dry ice into boxes, loin boxes, where they came on a conveyor belt towards me. And some of the boxes required dry ice, and some did not. I had to scoop with my left hand, similar to like a flour scoop, and I had to scoop dry ice into these boxes, and then tape them shut.

Now, I scooped between three to five thousand pounds of dry ice a night into these boxes.

The **Chairman**. Three to five thousand pounds.

Mr. **Kellen**. Right, and that was classified as light duty for my hand.

I have got a set of braces here that I wore out completely in a week. They are completely wore out, and the doctor could not believe it.

The **Chairman**. Did your left hand become so painful you had to go back to the clinic?

Mr. **Kellen**. Right. Yes, it did.

The **Chairman**. And did the doctor give you a slip indicating you should not do a job requiring scooping?

Mr. **Kellen**. Yes, he did.

The **Chairman**. And when you returned to work, were you assigned back to the same job scooping dry ice?

Mr. **Kellen**. Yes, I was. And I even showed it to a foreman in that department stating that I should not be doing this job.

The **Chairman**. And did the OSHA inspectors come through the plant some time in the past three weeks while you were still scooping dry ice?

Mr. **Kellen**. Yes, they did. They were called in by workers in the plant in January. There was a complaint because there were many of these carpal tunnel syndrome cases that were existing. OSHA was called in to the plant, but they never got around to check on these carpal tunnel syndrome deals.

The **Chairman**. You had had a slip from the doctor saying no scooping and hoped to show it to the OSHA inspectors, hadn't you?

Mr. **Kellen**. Had I showed it to them, did you say?

The **Chairman**. No. You wanted to show it to them.

Mr. **Kellen**. Right. Definitely. If they were there.

The **Chairman**. But you did not have an opportunity to do it?

Mr. **Kellen**. No, I did not.

The **Chairman**. Were they doing a carpal tunnel syndrome inspection?

Mr. **Kellen**. No. They were called in, like I said, in January because there was a complaint by the workers that were in there to have this checked. And something developed out of it where they were turned away by the company as far as checking this carpal tunnel syndrome, and they were told to get a warrant to come back.

The **Chairman**. And so you never got a chance to show the doctor's slip to the inspectors?

Mr. **Kellen**. No, I did not.

The **Chairman**. That was because they were not conducting a carpal tunnel inspection.

Mr. **Kellen**. Right. They were nowhere near us.

Senator **Metzenbaum**. Mrs. Paumier, I had hoped to be back at the time of your testimony. I am sorry I missed it, but I have a bill on the floor.

We just heard testimony from the staff person at OSHA who has been trying, so far unsuccessfully, to issue the long-awaited lockout/tagout standard. Do you feel that OSHA bears any of the responsibility for the tragedy that occurred to your husband?

Mrs. **Paumier**. Yes, I do.

Senator **Metzenbaum**. Did your husband ever discuss safety conditions at the workplace?

Mrs. **Paumier**. He did not with me to keep it away from the house, but he said that he was not, you know, real happy working under the conditions that he had to work under. But he never specifically, you know, told me why.

Senator **Metzenbaum**. Did he ever say anything to you about how difficult it would be or would not be to place a safety lock on the elevator?

Mrs. **Paumier**. No.

Senator **Metzenbaum**. The company placed such a safety lock on the elevator 12 hours after your husband's accident. Did anyone ever explain to you why the company waited until that point?

Mrs. **Paumier**. No, they did not.

Senator **Metzenbaum**. Was the company in communication with you after the accident?

Mrs. **Paumier**. I had to go and release his equipment that day, and that was the only time . . . that was the only time that, you know, I went in and they talked to me. But other than that, no, they have not——

Senator **Metzenbaum**. Other than that?

Mrs. **Paumier**. No.

Senator **Metzenbaum**. Thank you, Mrs. Paumier. Thank you for coming down to testify. I know it is difficult.

Mrs. **Paumier**. Yes, it is.

The **Chairman**. Mrs. Wall, nice to see you again. It has always been under these circumstances, but we want to tell you how grateful we are that you are coming here as well. We are going to ask for the record where you live, what is your address, and bring that mike right up close to you, if you would, please.

Mrs. **Wall**. I live in Roslindale, Massachusetts.

The **Chairman**. And I understand your son, Martin Wall, died on Christmas Eve 1986 as a result of injuries he received when he fell from a roof the previous day at a construction site in Framingham, Massachusetts. Is that right?

Mrs. **Wall**. Yes, he did.

The **Chairman**. How old was your son?

Mrs. **Wall**. Nineteen.

The **Chairman**. Would you be good enough just to bring that mike down a little closer.

Mrs. **Wall**. He was 19.

The **Chairman**. Nineteen. And where was he working at the time?

Mrs. **Wall**. He was working at the GM plant in Framingham.

The **Chairman**. And what was his occupation?

Mrs. **Wall**. He was an apprentice roofer.

The **Chairman**. Apprentice for who?

Mrs. **Wall**. With the Gilbane Company. He worked for Ceasar's Roofing Co.—Gilbane was the general contractor.

The **Chairman**. How long had he been working there?

Mrs. **Wall**. Six months.

The **Chairman**. Had he been going to college before that?

Mrs. **Wall**. He had been going to college before that, yes.

The CHAIRMAN. And was he thinking about going back to college?

Mrs. WALL. The night before he was killed, rather the night before his accident, we were sitting in his room, and I had said to him, "Will you think about it?" And he said yes, he would.

The CHAIRMAN. Was his father also working at the same location?

Mrs. WALL. Yes, he was.

The CHAIRMAN. I understand he has been a roofer for many years. Is that right?

Mrs. WALL. Yes.

The CHAIRMAN. Was your son working right beside his father?

Mrs. WALL. Yes, very close.

The CHAIRMAN. On the roof when the accident happened?

Mrs. WALL. Very close to him.

The CHAIRMAN. Did Martin's father see him fall?

Mrs. WALL. Yes, he did.

The CHAIRMAN. How did the accident happen?

Mrs. WALL. I guess he was driving a hot truck, and he got off the hot truck and he stepped on an unguarded skylight, from what I understand, and he fell 30 feet and subsequently died (he technically lived 24 hours after the accident). It was supposed to be secured, and it was not.

The CHAIRMAN. How long did it take them to remove your son after he fell?

Mrs. WALL. It took them over an hour to get him off the platform that he had fallen on. There was no elevator on the job.

The CHAIRMAN. Had your son complained to you about safety conditions at his job?

Mrs. WALL. Yes, he had. The same thing had almost happened to him within the month before, and he came home and he said to me, he said, "You know, Ma, I almost fell." He said, "There's a lot of safety hazards on that roof." And he had stepped on something like that, and he caught himself.

I said to him, I said, "Weren't you scared, Matty?" And he said, "Yes, I was." And I said, "Why don't you quit that job?" And he shrugged his shoulders and said, "It's all part of the job, Ma."

The CHAIRMAN. So the same type of accident that killed him almost happened before; is that right?

Mrs. WALL. That is right.

The CHAIRMAN. Did your son tell you that the contractor was pushing to get the construction completed?

Mrs. WALL. He told me that they wanted to get that job done before Christmas.

The CHAIRMAN. Did you learn after the accident that Martin Ploof of the Building Trades Council had called OSHA four days before your son fell, complaining about unsafe conditions at the job site?

Mrs. WALL. Yes, I did.

The CHAIRMAN. Did you also learn Mr. Ploof was told he would have to make the complaint in writing?

Mrs. WALL. He was told he had to put it in writing, and he did do that.

The CHAIRMAN. And you learned that Mr. Ploof did provide OSHA with a written complaint the day before your son was killed, and that it was being processed?

Mrs. WALL. Yes, it was.

The CHAIRMAN. Do you think that OSHA should have responded to Mr. Ploof's phone call and sent an inspector out to the site?

Mrs. WALL. Yes, I do.

The CHAIRMAN. Do you think he might be alive today if they had?

Mrs. WALL. Yes, I do.

[Material supplied for the record follows:]

MATTY'S ACCIDENT

It was a cold, dreary December night. John my boyfriend and I were going out on our ritual Tuesday night date. School was over and we were in high spirits looking forward to the long vacation and holiday that awaited us. That night was different from the rest. As we were looking at the beautiful Christmas lights that dazzled the city, John abruptly turned to me and said; "Matty was in an accident." Matty was our best friend. He was like a brother to us. He was someone very special to the both of us and we valued his friendship a great deal. Matty had worked construction for the past six months and had minor accidents in the past. John and I had never thought that this could come to anything near terrible. As we were driving home that night we wondered what hospital he had been taken to. We stopped at the Faulkner hospital in Jamaica Plain and inquired at the emergency room. There was no one listed in that name. Thoughts of what bone he had broken and wondering what to give him for a get well present were occupying our minds. As John left me off at my house that night he said he would call his mother's house the next day to find out what hospital he was in.

The next day was Christmas Eve. As I woke up that morning I was anticipating John's phone call that would tell me how my good friend Matty was doing. I was looking forward to seeing him and telling him how well I did on my presentation in which he drew a creative poster for me. I was getting ready to go to the hospital once the call came. I automatically knew it was him. Full of anxiousness the words "what hospital is he in" and "how is he doing" came rushing out of my mouth. My heart beating anxiously of the words I was ready to hear. John's voice on the other end was very soft and not to my expectation. He asked if I was alone. I said; "Why are you asking me that", "Will you please answer my questions". I felt something in my heart dropping, it felt like someone was stabbing away at my heart. John's words came out like a rush of thunder. In a soft voice he said "I can't believe it". "What are you talking about", tears streaming down my face. My questions were receiving no answers. I felt so alone and afraid. Silence on the other end then "Matty is dead". My hand shaking uncontrollably I hung up the phone. I was full of anger at God. How could he take my friend away who was so young and had so much to live for.

Christmas was no holiday for either John or myself. It was like a bad dream and I kept hoping I would wake up and find Matty standing before me. The funeral was two days after Christmas. Many people paid their repects. Faces of friends, and family filled with shock and severe sadness. I sat there thinking while looking at his grave of all the wonderful times we shared together. I couldn't believe that this was our last goodbye. Why my best friend? Why?

It is a year since Matty's accident. Matty is still greatly missed. I visit his grave and I wish somehow I could see and touch him and tell him what a great friend he was and how much I loved him. Matty's death was a big tragedy in my life and a day does not go by that I do not think of him. Matty's memory will be with me for the rest of my life. I feel that someday we will be together again. But for now I know he is happy and in peace at last.

Nothing can replace Matty. We can't have him back. But I feel something must be done. Mary, Matty's mother wrote a petition to the president requesting more funds so inspectors can carefully inspect construction sites before the workers go on the job. Mary received many signatures. People in our country want to see something done. I hope our Congress realizes this before another family or friend loses a loved one due to construction work.

- written by
Julie Laby
Arborway
Jamaica Plain, Ma
02130

Prior to my son's accident which caused his death, a similar situation occurred in which he almost fell through a skylight that was not secured. He came home that evening and told me of his near accident. I said "Mat weren't you scared,." He said, "ya mum, I was," I said, "Matty quit that job, before you get hurt or killed." He said, "Its all part of the job mum."

I would like to share with you a brief glimpse of what the past 15½ months have been like. I have memories of sitting in the hospital the morning of Christmas eve still praying that somehow, by some miracle, my son would live. A group of carolers passed by the Intensive Care Unit singing "Jingle Bells." In mid verse they switched their song to "silent night" and somehow I knew that some one had told them about my son. I will never hear that song again without thinking of that moment. My Matty did not last the day and died the afternoon of December 24. Christmas morning with gifts piled under the tree(which had been selected especially for Matty because he wanted a "big" Christmas tree) we opened only the gifts that Matty had bought for each of us. He had put so much thought into each one. He was like a big kid at Christmas. It was his favorite time of the year and he had been looking so forward to it. Christmas afternoon it was so hard to believe that we were selecting a coffin for him. It was like walking through a very bad dream. If someone had told me that this was just the beginning of such a painful experience I would not have believed them. As the shock wore off, I was unaware of the emotional roller coaster ride my son's death would put me on. I had days when I could not function I was so full of the loss of my son. My concentration, ability to listen and comprehend were totally absent on certain days. Other days I would do better. I'd tell myself that I had to go on that my son Jimmy and my husband Gerry (whom I had only married 1½ before our tragedy) needed me and I had to be strong. My Matty had given me away at our wedding. I watched how it effected Jimmy. Outwardly, he was very strong, but I watched his loneliness and isolation, especially at family gatherings, which were difficult for all of us because Matty was so noticeably absent.

Not only did I lose one son, but I had to watch the other one suffer with the loneliness and loss of his brother, and when I asked Jimmy in August what he wanted for his birthday which was one day before his brother's and he replied, "how about my brother." I thought my heart would break. It was the one thing I wanted to give him most and couldn't.

I was tortured by thoughts of what my Matty thought and how frightened he must have been before he hit the ground. He had always been so careful of himself as a child and never even had stitches. I prayed that any suffering he had was short.

Some days I would go to work and think that I was doing great and some memory would hit me and I couldn't stop crying. I tried so hard to be strong but I never knew anything could hurt this much. I met a woman at a seminar for people who have lost children (Helen Notarangelo). Her 17-year old son Ricky was killed in a construction accident in Norwell, MA on May 14, 1984. She told me that OSHA was called and a small fine was issued which she thinks the contractor appealed. The fines in the event of my son's death amounted to $2800 for two companies which the contractor appealed on plea bargaining and did not have to pay. These are some, but not all of my reasons for being here. My son was very idealistic. He would have wanted some laws changed to make things better for people in the construction trades. I can't tell you how devastated I was when they announced the amounts on the fines in the event of my son's death. I felt like that was the value they placed on his life, and what a small penalty it was to pay for something that was so precious to me. I hope by being here today that other families can benefit by changes made in the OSHA regulations. Many people have approached me with their viewpoints and disappointment in what has happened to OSHA. I don't blame that on the people that work for OSHA but on a system with inadequate manpower to insure a safe workplace and fines not adequate enough to deter these practices.

The Chairman. Okay. We want to welcome Mrs. Cox to the committee. I understand you are a volunteer organizer for the United Farm Workers Union in San Juan, Texas. Is that right?

Mrs. Cox. Yes, sir, I am.

The Chairman. And how long have you been doing that work?

Mrs. Cox. Oh, I started back in 1973.

The Chairman. Did you work in the fields as a farm worker yourself for a number of years?

Mrs. Cox. Yes, sir, until about the age of 18.

The Chairman. And how many farm workers are there in the south Texas area that you serve?

Mrs. Cox. We have about 80,000 to 150,000 throughout south Texas.

The Chairman. When did OSHA take over the enforcement of the field sanitation standard in Texas?

Mrs. Cox. Just in May of 1987.

The Chairman. Before that, there were State and county regulations?

Mrs. Cox. State and county, yes.

The Chairman. Did they provide, as the new Federal standard does, that there must be toilets in the field, drinking water, and cups for drinking water, and water for the workers to wash their hands?

Mrs. Cox. Yes. The State and the county do, and at a much lower level with the State and the county, the regulations say it is one toilet for every—well, when there are seven workers in the field, they should have one toilet. OSHA does not provide any—you have to have 11 and up workers, and only when they have been out in the fields for three hours.

So under ten workers and less than three hours, they feel they do not need to have a bathroom.

The Chairman. Well, you have certain regulations. Who enforced the regulations?

Mrs. Cox. The State.

The Chairman. Did the county inspectors respond to complaints? And were they often present in the fields?

Mrs. Cox. No. We started in 1980 trying to get the field sanitation regulations passed by the State, and since then we have had hundreds of complaints and we have had major problems getting the inspectors on to the fields, the county inspectors. Now, with OSHA, we had hopes. You hear about the Federal Government being so huge, and we thought maybe we would have a chance of getting inspectors out into the fields. But it has not changed any.

The Chairman. OSHA also has the requirements for the toilets and for drinking water and for washing water so they can get the pesticides and insecticides off the workers. Is that correct, basically?

Mrs. Cox. Right.

The Chairman. Now, how far from San Juan is the nearest OSHA office?

Mrs. Cox. They are three hours away.

The Chairman. It takes that long to drive from Corpus Christi to the San Juan area; is that right?

Mrs. Cox. Exactly.

The CHAIRMAN. Corpus Christi is where the OSHA office is.

Mrs. COX. Yes.

The CHAIRMAN. When OSHA took over enforcement of the new standards, did you direct your complaints to the Corpus Christi office?

Mrs. COX. Right, yes. We have to call long distance now and give them our complaint over the phone, and only to speed it up some hoping that they would come and check out the fields and find the farmers in violations. But there is a form that you have to sign for it to become a formal complaint. And so we call and try within that hour to try to get that signed form up to Corpus Christi.

The CHAIRMAN. So you would call up Corpus Christi with the complaints. What happened?

Mrs. COX. We would tell them the site of the violation, and we tell them how many workers were involved. We specify the crop and give them an idea—well, they need the exact location, where it is going to be at.

The CHAIRMAN. Was there widespread disregard of the field sanitation standard?

Mrs. COX. Oh, yes, there is. Not us. We have had both the State, county and now with the Federal regs., not a single violation has been offered.

The CHAIRMAN. Did the Farm Workers Union finally arrange for a meeting which was held in McAllen, Texas, on February 29 of this year?

Mrs. COX. Yes, we did. February 28, 29, yes.

The CHAIRMAN. Did the OSHA officials say they would respond to your complaints?

Mrs. COX. They said that they were going to do the best they could because they had so many counties and so few workers to cover the area, and because their office was so far. At that time, we had suggestions as to agriculture. You cannot find it in Corpus Christi, so why didn't they have an office nearby and request for more workers? But we have not heard from them since.

The CHAIRMAN. So you have been told the complaints have to be written and signed by you or other union officials as representatives of the workers in the field.

Mrs. COX. Right.

The CHAIRMAN. Are the workers in the field afraid to sign complaints themselves?

Mrs. COX. Yes, they are because it has been in the press a lot. A few years ago, one of our members complained about the lack of field sanitation, and she was fired from her job. That case went all the way up to the Texas Supreme Court and was finally decided in favor of her. But when you are in the news like that and an issue like that comes up, you take care of your job.

The CHAIRMAN. Do you send a number of written complaints to the OSHA office?

Mrs. COX. Yes.

The CHAIRMAN. I have some here. Let me read them. "Dear Mrs. Cox: On February 25, Occupational Safety and Health Administration, Corpus Christi office, made a concerted attempt to inspect the following locations as listed in your complaint, but no work was in progress: three miles north of expressway on Tower Road; two, a half mile east of FM–1432 on 83; five miles south of Business 83 on Stewart Road; two-and-a-half miles north of Business 83 on Morningside; three miles south of Business 83 Alamo Road, Alamo, Texas; southeast corner of Alamo Road and FM–495."

Then it continues, "OSHA, however, did conduct inspections on the other locations listed in your complaint. The result of these inspections will be addressed under a separate cover at a later date."

The top of it said, "OSHA made a concerted attempt to inspect the following locations . . . but no work was in progress."

[The letter referred to follows:]

[redacted]

U. S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
CORPUS CHRISTI AREA OFFICE
GOVERNMENT PLAZA
400 MANN STREET, ROOM 300
CORPUS CHRISTI, TEXAS 78401
512-888-3257

Reply to the Attention of:RLMH:keg

March 8, 1988

United Farm Workers Of America
P.O. Box 188
San Juan, Texas 78589

Attn: Ms. Juanita Valdez Cox

Dear Ms. Cox:

On February 25, 1987 the Occupational Safety and Health Administration OSHA, Corpus Christi Area Office made a concerted attempt to inspect the following locations as listed in your complaint but no work was in progress:

1) 3 miles North of Expressway on Tower Road.

2) 1/2 miles East of FM 1432 on 83.

3) 5 miles South of Business 83 on Steward Road.

4) 2 1/2 miles North of Business 83 on Morningside.

5) 3 miles South of Business 83 on Alamo Road, Alamo, TX.

6) Southeast corner of Alamo Road and FM 495, Alamo, TX.

7) 1 1/2 mile North of Expressway 83 on Tower Road.

8) 4 miles North of Business 83 on Morningside Rd., San Juan, TX.

OSHA however did conduct inspections on the other locations listed in your complaint the results of these inspections will be addressed under a separate letter at a later date.

Thank you for your concern for occupational safety and health. Let us know if we may be of further assistance.

Sincerely,

R L Mike Hunter
R. L. MIKE HUNTER
Area Director

Mrs. Cox. Right.

The Chairman. Well, if there was work in progress which you complained about, and OSHA gets out there and says no work in progress, how can that be?

Mrs. Cox. It just takes them days and sometimes weeks to get to the site. In agriculture, it is temporary. Right now, the official unemployment rate is about 25 percent; unofficially, it is about 30 and 35 percent. So that there are hundreds of workers at a field, and therefore, maybe five or six hours is what they would work. So to have OSHA——

The Chairman. So the point you are making is in many of these situations it may be a few hours, it may be a few days.

Mrs. Cox. Yes.

The Chairman. And by the time OSHA responds, the crops have already been picked.

Mrs. Cox. Picked, yes.

The Chairman. But in each and every one of those areas which have been described in your complaint, you believed that there were violations of the OSHA regulations.

Mrs. Cox. We know that there were, right, yes, because these complaints come from farm workers themselves who call us into the office to complain. And then the other thing with OSHA is that when we write a complaint, we ask them to investigate, and they ask us what is the name of the grower or what is the name of the shed; what is his phone number, what is his address. Before they take the complaint, once they sent—well, more than once they have sent forms back telling me that they do not have sufficient information. And I said, "Well, that is your job to investigate it. How in the world are the union organizers going to get the name, address and phone number of the farmer?"

And so they sent back the complaints that it is insufficient information on it.

The Chairman. Are there still many fields where the provisions of the standard are being ignored?

Mrs. Cox. Yes, there are. Just last week.

The Chairman. So the standard is not being enforced?

Mrs. Cox. No. No, not at all.

The Chairman. What is the solution, do you believe, to the problem?

Mrs. Cox. Well, I think the first thing is that where States have stronger regulations, like Texas does in this case, OSHA should not be allowed to pre-empt. And I think the first thing is to tell OSHA to get out of Texas on field sanitation because we have stronger regulations that we go by.

The other one is that they have more inspectors out there. The only way we know how to do that is to have other agencies helping them check fields, have other State and Federal agencies involved so that they can go out and do these inspections when we call them in, or at least within a reasonable period of time.

The Chairman. Well, I would certainly draw the same conclusion. Apparently, if we have the closing of the various regional offices and a general unwillingness to be out there and doing that job, it is quite apparent from what you say that the job is not getting done by OSHA.

Mrs. Cox. It is not.

The **Chairman**. It is not doing the job that it should.

Mrs. Cox. It is not.

The **Chairman**. Senator Metzenbaum.

Senator **Metzenbaum**. Mr. Chairman, you touch upon a subject here that disturbs me much, because for some years now I have been trying to get a field sanitation standard. Then Secretary Brock came in and said we should let the States have sufficient time to try to put their own standards into effect.

I am frank to say that he ducked his responsibility. He just ducked his responsibility. We are talking about elementary considerations. We are not talking about complicated issues. We are talking about people having the right to have drinking water or to have toilet facilities on these agricultural farms.

After he ducked the question and gave the States the opportunity to set their own standards, then the courts finally ordered the Department of Labor to act. So the Department of Labor then said: All right, we will do it because we are under a court order. Now, we have Mrs. Cox testifying before us that, notwithstanding the fact that the standards are now in place, OSHA still fails to meet its responsibility.

It just flabbergasts me that this woman is saying that the State of Texas does a better job. That is great. But some States do not do a better job. I think what it reflects is that OSHA is failing to do the job that they are getting paid to do, and that we expect them to do.

I must say to you that it is understandable why people turn off from their Government and have a sense of frustration and think Government just is not there to protect them. To me, it is extremely disturbing to hear these witnesses. I did not hear all of the witnesses on this panel, but I know what the thrust of their testimony was, and I heard the earlier witnesses.

First, the Secretary of Labor fails to meet his responsibilities, then the court orders the department to do that which it is supposed to do anyhow, and still then the department does not conform with those obligations.

I am grateful to these witnesses for appearing here this morning, and particularly grateful again to you, Mr. Chairman, for holding these hearings. To me what we are saying is that the people of this country expect their Government to work and to perform the responsibilities that they were given. When they do not do it, I think they owe the people of the country a total apology, and maybe also a resignation if they are not willing to do the job that they are called upon to do.

I apologize for speaking out so strongly, but I feel very strongly about it. And I think your hearings have certainly zeroed in on the issue that faces all of us.

The **Chairman**. Thank you.

Mrs. Cox. For Senator Metzenbaum, I was going to let you know that we are now worried that the Federal Government might try to pre-empt our pesticide regulations, which are very, very strong in Texas. Now with OSHA, and we have seen their inadequacy with field sanitation, we would like your support and your voice in helping us not let OSHA pre-empt ours with Federal regs., because with the new FIFRA they are trying to do that. That would be a disaster, also.

Senator METZENBAUM. I will discuss with the chairman whether or not we can in some way raise that issue. I do not want to indicate that the Federal Government should not pre-empt State laws, because some States perhaps do not have as strong standards as you do.

Mrs. COX. Right. But we are talking about where stronger regulations are already in place.

Senator METZENBAUM. Perhaps we can get off a letter together that raises this issue but does not keep them from going into States where the pesticides regulations are not strong enough.

Mrs. COX. Exactly. Thank you.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mrs. Cox follows:]

STATEMENT BEFORE THE SENATE LABOR COMMITTEE

JUANITA VALDEZ-COX

19 APRIL 1988

GOOD DAY SENATORS. MY NAME IS JUANITA VALDEZ-COX, AND I AM AN ORGANIZER FOR THE UNITED FARM WORKERS OF AMERICA IN SAN JUAN, TEXAS. I AM HERE TODAY TO TALK ABOUT THE PROBLEMS WE HAVE ENCOUNTERED IN SOUTH TEXAS OVER THE LAST FIVE YEARS IN ATTEMPTING TO SECURE COMPIANCE WITH STATE AND FEDERAL RULES WHICH REQUIRE FARMERS TO PROVIDE SANITATION FACILITIES FOR FIELD WORKERS.

TO HELP YOU UNDERSTAND THE PROBLEMS WE HAVE FACED, LET ME FIRST DESCRIBE SOME OF THE MAJOR FEATURES OF AGRICULTURE AND FARM LABOR IN OUR STATE. ACCORDING TO OFFICIAL SOURCES, AGRICULTURE IS THE NUMBER ONE INDUSTRY IN TEXAS, AND INDEED TEXAS FARMERS AND FARM WORKERS PRODUCE AN ABUNDANT VARIETY OF FRUITS, NUTS, VEGETABLES, AND COMMODITIES. FROM THE FARMWORKERS' POINT OF VIEW, THE AGRICULTURE CYCLE BEGINS IN THE AUTUMN IN THE RIO GRANDE VALLEY OF SOUTH TEXAS. THE VALLEY IS THE HOME BASE FOR SOME 80,000 TO 150,000 FARMWORKERS, WHO TEND AND HARVEST THE VALLEY'S WINTER VEGETABLES AND PINK GRAPEFRUIT CROPS EVERY WINTER. IN THE SPRINGTIME, WORKERS HARVEST THE CUCUMBERS, ONIONS, MELONS, AND PEPPRS BEFORE THOUSANDS MOVE TO THE BIG BEND COUNTRY IN EARLY SUMMER. WHILE IN THE PECOS-PRESIDIO AREA THESE WORKERS BRING IN THE MELON AND ONION CROPS BEFORE MOVING ANOTHER 250 MILES NORTH TO THE PANHANDLE AREA, WHERE THEY ARE PRIMARILY OCCUPED WITH WORK IN ONIONS, PEPPERS, AND CABBAGE. WORKERS FILL IN BETWEEN THOSE CROPS BY HIRING OUT TO CHOP WEEDS FROM THE COTTON FIELDS. AS SUMMER ENDS, WORKERS BEGIN TO HEAD BACK TO THE VALLEY TO START ANOTHER CYCLE OF CROPS.... ANOTHER YEAR ON THE TREADMILL. THESE WORKERS PLACE A BOUNTY ON YOUR TABLES AND HELP TO FEED A HUNGRY WORLD. AT THE SAME TIME MANY GO HUNGRY THEMSELVES WHILE WORKING FOR MISERABLY LOW WAGES UNDER ABSOLUTELY INHUMANE CONDITIONS.

MY PARENTS HAVE BEEN FARMWORKERS ALL THEIR LIFES, AND MY BROTHERS, SISTERS AND I BEGAN WORKING ALONGSIDE THEM WHEN WE WERE EACH ABOUT 10 YEARS OLD. I REMEMBER PICKING COTTON AND PEPPERS AND CLIPPING ONIONS IN THE VALLEY. WE DETASSLED SEED CORN IN NEW MEXICO AND THINNED ENDLESS ROWS OF LETTUCE IN THE PANHANDLE OF TEXAS WITH A SHORT-HANDLED HOE. WE ALSO WORKED IN THE SUGARBEETS, POTATOES, CHERRIES, APSARAGUS, AND TOMATOES WHEREVER THOSE CROPS WERE GROWN. AND THOUGH WE WORKED IN SO Many DIFFERENT CROP IN SO MANY DIFFERENT PLACES, CERTAIN POINTS REMAIN ENGRAVED ON MY MEMORY. I WILL NEVER FORGET THE WAY STRANGERS TREATED US, SOMETIMES GOOD BUT TOO OFTEN BAD. WHO CAN EVER FORGET THE TERROR OF HAVING SPRAY PLANES PASSING OVERHEAD AND DUMPING THEIR LOADS OF POISON ON US AS WE WORKED. I REMEMBER THE LONG HOURS IN THE HOT SUN, THE DISGRACEFULLY LOW PAY, AND IF THAT WERE NOT ENOUGH, I REMEMBER HAVING TO WAIT ALL DAY TO GO TO THE BATHROOM BECAUSE THERE WERE NO TOILETS.

AS I GREW UP, I RESOLVED TO GET AWAY FROM THE MISERIES OF THE FIELDS, AND EVENTUALLY I GOT INVOLVED IN EARLY CHILDHOOD EDUCATION. I THOUGHT I HAD PUT FARM LABOR BEHIND ME, BUT THE MEMORIES WOULD NOT GO AWAY. AFTER A FEW SHORT YEARS I FOUND MYSELF GETTING INVOLVED IN FARMWORKERS ISSUES AGAIN, THIS TIME THROUGH THEIR UNION. SINCE 1973 I HAVE BEEN WORKING WITH THE TEXAS PROJECT OF THE UNITED FARM WORKERS OF AMERICA, TRYING TO ADDRESS THE INEQUITIES AND INJUSTICES STILL BEING VISITED UPON OUR NATION'S POOREST WORKING PEOPLE.

SINCE THE LATE 1970'S THE UNION MEMBERS HAVE BEEN WORKING TO FORCE GROWERS IN TEXAS TO PROVIDE BASIC SANITARY FACILITIES AND DRINKING WATER FOR FIELD CREWS. THOUGH IT SOUNDS RIDICULOUS TO SAY IN 1988, OUR EFFORTS HAVE BEEN MET WITH INDIFFERENCE AND EVEN HOSTILITY BY GROWERS AND GOVERNMENT OFFICIALS ALIKE. A PRIME EXAMPLE IS OSHA ITSELF, WHICH "STUDIED" THE ISSUE OF FIELD SANITATION FOR MORE THAN TEN YEARS BEFORE FINALLY ADOPTING THEIR STANDARDS.

IF TOILETS AND HANDWASHING FACILITIES WERE NOT SO IMPORTANT, FARMWORKERS WOULD NOT EXPEND SO MUCH EFFORT TO ACQUIRE THEM. MEDICAL EXPERTS HAVE TESTFIED FOR YEARS ABOUT THE SERIOUS HEALTH PROBLEMS FARMWORKERS EXPERIENCE AS A RESULT OF HAVING NO ACCESS TO TOILETS. FURTHERMORE, HANDWASHING FACILITIES ARE CRITICAL ALSO, BECAUSE OF THE POTENTIAL FOR POISONONG THROUGH INGESTION OR ABSORPTION OF PESTICIDE RESIDUES ON WORKERS' HANDS. FINALLY, PROPER FIELD SANITATION HELPS TO BETTER PROTECT THE PUBLIC HEALTH, FOR WHEN NO FACILITIES ARE PROVIDED, WORKERS HAVE NO CHOICE BUT TO ELIMINATE, WHEN THEY MUST, RIGHT THERE IN THE FIELD.

FINALLY, IN 1983 THE TEXAS DEPARTMENT OF HEALTH ADOPTED A SET OF SANITATION STANDARDS, AFTER A PROLONGED CAMPAIGN OF PRESSURE ON PUBLIC OFFICIALS. THE RULES ADOPTED ARE AMONG THE MOST PROGRESSIVE STANDARDS IN THE WHOLE COUNTRY. OUR RULES REQUIRE AN EMPLOYER TO PROVIDE CLEAN TOILET FACILITIES, COOL DRINKING WATER, DISPOSABLE DRINKING CUPS, HANDWASHING WATER, SOAP, AND DISPOSABLE TOWELLS AT ANY WORK SITE WHERE SEVEN OR MORE PEOPLE ARE WORKING. THESE FACILITIES ARE REQUIRED AT THE FIELD FROM THE TIME WORKERS BEGIN WORKING UNTIL THEY LEAVE THE SITE. THERE IS NO TIME THRESHHOLD LIKE THAT FOUND IN THE OSHA STANDARD.

WHEN THESE RULES WERE ADOPTED IN 1983, FARMWORKERS WERE HOPEFUL THAT GROWERS IN OUR STATE WOULD SUDDENLY CHANGE THEIR OLD HABITS OF NEGLECT AND ABUSE OF THEIR WORKERS, AND IMMEDIATELY COMPLY WITH THE TEXAS RULES. OF COURSE SUCH WAS NOT THE CASE. IN THEIR USUAL MANNER, FARM ORGANIZATIONS CRIED AND MOANED THAT THIS WOULD BE THE FINAL STRAW AND THOUSANDS OF OTHERWISE PROFITABLE FARMERS WOULD BE DRIVEN OUT OF BUSINESS. WITH THAT AS THEIR THEME, THOUSANDS OF FARMERS HAVE STEADFASTLY REFUSED TO COMPLY. I MUST SAY, HOWEVER, THAT SEVERAL REPUTABLE GROWERS HAVE STUDIED THE RULES AND ARE CONSCIENTIOUSLY TRYING TO PROVIDE THE NECESSARY FACILITIES. BUT THE VAST

MAJORITY OF GROWERS IN SOUTH TEXAS, WHERE I WORK, MAKE ONLY TOKEN EFFORTS TO PROVIDE FOR SANITATION IN THEIR FIELDS. TOILETS, WHEN THEY ARE PROVIDED, ARE GENERALLY SO FILTHY AS TO DISCOURAGE ALL BUT THE MOST DESPERATE. A COMMON DRINKING CUP IS STILL THE RULE, AND SOAP, HAND-WASHING WATER, AND DISPOSABLE TOWELLS ARE PRACTICALLY UNHEARD OF.

THAT HAS BEEN OUR EXPERIENCE IN AN AREA WHERE THE FARMWORKERS HAVE ESTABLISHED THEMSELVES AS A FORCE TO BE DEALT WITH. IN OTHER REGIONS OF THE STATE, WHERE WORKERS ARE NOT WELL ORGANIZED, OUR MEMBERS REPORT THAT OBSERVANCE OF ANY MEASURE INTENDED TO PROVIDE PROTECTION FOR FARMWORKERS IS ALMOST COMPLETELY IGNORED BY BOTH THE GROWERS AND THE AGENCIES ALLEGED TO HAVE ENFORCEMENT AUTHORITY. THE ONLY THING MORE UNUSUAL IN THE FIELDS OF WEST TEXAS THAN A PROPERLY OUTFITTED SANITARY FACILITY IS AN AGENT OF THE US DEPARTMENT OF LABOR CHECKING TO ASSURE THAT THE FARMERS ARE INDEED PAYING WORKERS AT LEAST $3.35 AS REQUIRED BY LAW.

AS WITH ANY OTHER LAW INTENDED TO PROTECT WORKING PEOPLE, ENFORCEMENT OF THE LAW IS DIRECTLY PROPORTIONAL TO THE PRESSURE APPLIED TO THE GOVERNMENT OFFICIALS CHARGED WITH THAT TASK. IN THE CASE OF THE TEXAS FIELD SANITATION RULES, ENFORCEMENT AUTHORITY IS PLACED WITH THE TEXAS DEPARTMENT OF HEALTH, WHICH IN TURN RELEGATES THAT TASK TO COUNTY DEAPRTMENTS OF HEALTH. IN THEORY SUCH A SYSTEM SHOULD HAVE MANY ADVANTAGES. LOCALLY BASED INSPECTORS SHOULD BE ABLE TO RESPOND MORE QUICKLY TO THE NEEDS OF THEIR CONSTIUENTS. SADLY, SUCH HAS NOT BEEN OUR EXPERIENCE IN SOUTH TEXAS, BUT THE CONTRARY. FOR NEALY TWO YEARS, THE HIDALGO COUNTY HEALTH DEPARTMENT REFUSED TO EVEN ACCEPT AND INVESTIGATE OUR REPORTS OF VIOLATIONS. FINALLY WE PREVAILED UPON THE COUNTY GOVERNMENT TO REPLACE THE DIRECTOR OF THE HEALTH DEPARTMENT WITH A PERSON MORE SYMPATHETIC TO OUR CAUSE. THEN AT LEAST THEY BEGAN TO ACCEPT

COMPLAINTS AND EVENTUALLY TO SEND AN INSPECTOR TO EXAMINE THE INADEQUATE FACILITIES. OVER THE LAST THREE YEARS, WE HAVE REPORTED OVER 250 VIOLATIONS OF THE TEXAS FIELD SANITATION REGULATIONS. BUT NOT ONE GROWER IN HIDALGO COUNTY HAS BEEN PROSECUTED FOR HAVING VIOLATED THE LAW. THE ONLY CONCLUSION WE COULD REACH IS THAT THE COUNTY HAS BOWED TO THE ECONOMIC POWER OF THE FARMERS.

OUR FRUSTRATION WITH THE MANNER IN WHICH THE STATE APPROACHED ENFORCEMENT OF THEIR RULES LED US TO ACCEPT WITHOUT OPPOSITION THE ENTRANCE OF OSHA INTO THE ARENA IN 1987. AT LEAST, WE REASONED, A FEDERAL AGENCY COULD NOT BE INTIMIDATED BY A BUNCH OF HARD-HEADED AND HARD-HEARTED FARMERS. BUT SINCE OSHA PREEMPTED THE TEXAS FIELD SANITATION RULES, FARMWORKERS HAVE SEEN NO IMPROVEMENTS IN THE FACILITIES OR THE ENFORCEMENT EFFORT. THOUGH THEIR SPIRIT IS VERY WILLING, IT SEEMS THAT THE FLESH AT OSHA IS WEAK INDEED. THE OSHA OFFICE CLOSEST TO THE VALLEY IS LOCATED IN CORPUS CHRISTI, ABOUT 150 MILES FROM THE VALLEY. AND SINCE THE INSPECTORS THERE HAVE TO ENFORCE THE ENTIRE RANGE OF THE ACT OVER AT LEAST A 20 COUNTY AREA, IT IS RARE INDEED THAT AN INSPECTOR CAN BE FOUND IN THE VALLEY AT ALL. TO REPORT A VIOLATION WE CALL THE CORPUS OFFICE AND GIVE THEM THE LOCATION WHERE PEOPLE WERE SEEN WORKING WITHOUT ADEQUATE FACILITIES. IN MOST CASES, SEVERAL DAYS PASS BEFORE AN INSPECTOR CAN REACH THE LOCATION, BY WHICH TIME WORKERS HAVE MOVED TO SOME OTHER LOCATION. THE INSPECTOR DUTIFULY REPORTS THAT NO FACILITIES WERE AVAILABLE TO INSPECT BECAUSE NO WORK WAS IN PROGRESS. OF COUSE NO WORK WAS IN PROGRESS. AGRICULTURE BY ITS NATURE IS A TEMPORARY ACTIVITY. IF VIOLATORS ARE GOING TO BE CAUGHT, THE INSPECTION MUST BE DONE WITHIN A MATTER OF JUST A COUPLE OF HOURS. AS LONG AS GROWERS KNOW THAT NO ENFORCEMENT OFFICERS ARE NOT LIKELY TO APPEAR FOR A COUPLE OF DAYS, WHY SHOULD THEY GO TO THE EXPENSE OF COMPLYING?

THE OTHER PROBLEM WE HAVE ENCOUNTERED IN DEALING WITH THE OSHA OFFICE IN CORPUS CHRISTI IS THAT THEY WANT US TO PROVIDE COMPLETE NAME, ADDRESS, AND TELEPHONE NUMBERS FOR FARMERS WE ARE REPORTING AS VIOLATORS. THEY DO NOT UNDERSTAND THAT FARMWORKERS DO NOT HAVE ACCESS TO SUCH VALUABLE DATA. MORE OFTEN THAN NOT, WORKERS DO NOT EVEN KNOW THE NAME OF THE FARMER ON WHOSE LAND THEY ARE WORKING. I CANNOT BELIEVE THAT EXPERIENCED INVESTIGATORS COULD NOT FIND A WAY TO LOCATE THIS INFORMATION WITHOUT PLACING THAT BURDEN ON WORKERS. IN THE END THE IMPACT OF THAT POLICY IS TO PLACE FURTHER IMPEDIMENTS IN THE PATH OF A WORKER IN SEARCH OF FAIR TREATMENT.

YOU HAVE BEEN VERY PATIENT AS I HAVE OUTLINED OUR TROUBLES IN THE AREA OF FIELD SANITATION. NOW, I WOULD LIKE TO OFFER A FEW SUGGESTIONS WHICH WE BELIEVE WOULD HELP TO RESOLVE THE PROBLEMS FACING FARMWORKERS IN TEXAS. THE FIRST CHANGE WE WOULD SUGGEST IS THAT YOU INSTRUCT OSHA TO REVERSE ITS POSITION ON PREEMPTION OF STATE FIELD SANITAION STANDARDS. AS I NOTED EARLIER, OUR STANDARDS ARE STRONGER THAN THOSE ADOPTED BY OSHA. WHILE WE RECOGNIZE THE ROLE OF THE FEDERAL GOVERNMENT IN ESTABLISHING MINIMUM STANDARDS FOR PROTECTING WORKERS, WE ALSO BELIEVE THAT FEDERAL AGENCIES SHOULD NOT UNDERMINE THE CONCESSIONS WORKERS HAVE WON THROUGH LEGITIMATE MEANS. TAKE FOR EXAMPLE THE FEDERAL PESTCIDE LAW, FIFRA. THAT LAW ALLOWS STATES TO ADOPT STRONGER WORKER PROTECTION RESTRICTIONS THAN THOSE SPECIFIED BY EPA. AS A RESULT, FARMWORKERS IN CALIFORNIA, TEXAS, AND SEVERAL OTHER STATES HAVE WON STRONGER PROTECTIVE RULES THAN THOSE ESTABLISHED BY EPA AS NATIONAL MINIMUM STANDARDS. A SIMILAR POLICY FOR OSHA WOULD ALLOW INDIVIDUAL STATES TO ADOPT AND ENFORCE STRONGER SANITATION RULES TO PROVIDE BETTER PROTECTION OF THE HEALTH AND SAFETY OF ITS CITIZENS THAN THAT REQUIRED BY OSHA.

SECONDLY, I WOULD URGE YOU TO INCLUDE A PRIVATE RIGHT OF ACTION IN THE ENFORCEMENT PROVISIONS OF OSHA. I AM NOT AN ATTORNEY SO I CANNOT ARGUE THE LEGAL REASONS FOR OR AGAINST THIS PROPOSAL. BUT IT JUST SEEMS TO MAKE GOOD SENSE TO ALLOW FARMWORKERS WHO ARE AGGRIEVED BY THEIR EMPLOYER TO BE ABLE TO FORCE THOSE EMPLOYERS TO ANSWER FOR THEIR ACTIONS, ESPECIALLY WHEN THE GOVERNMENT AGENCIES REFUSE TO DO SO.

FINALLY I WOULD REMIND YOU THAT IF OSHA IS DETERMINED TO EFFECTIVELY ENFORCE THEIR SANITATION RULES, THEY WILL NEED A MUCH LARGER FIELD INSPECTION FORCE. HERE AGAIN WE WOULD URGE YOU TO STUDY THE EXAMPLE OF THE WAY EPA ACCOMPLISHES THE TASK OF ENFORCING FIFRA. USING A SYSTEM OF COOPRATIVE AGREEMENTS, EPA PROVIDES FUNDS TO THE STATES WHO ASSUME RESPONSIBILITY FOR ENFORCING FEDERAL LAW. BY THIS METHOD, STATES ARE ABLE TO EMPLOY FIELD STAFF TO RESPOND TO COMPLAINTS AND ASSURE THE REGULATED COMMUNITY OF THEIR INTENTION TO ASSURE COMPLIANCE WITH THE FEDERAL LAW. I AM CONVINCED THAT SUCH A SYSTEM WOULD SERVE EQUALLY THE INTERESTS OF OSHA, INDIVIDUAL STATES, AND MOST IMPORTANTLY, FARMWORKERS WHEREVER THEY MAY GO.

THANK YOU FOR THIS OPPORTUNITY TO SPEAK HERE TODAY. IF YOU HAVE QUESTIONS I SHOULD BE HAPPY TO TRY TO ANSWER THEM.

For further information please call
Juanita Valdez-Cox 512-787-2233
San Juan, Texas

The **Chairman**. Today, the committee concludes its second day of oversight hearings on the Occupational Safety and Health Administration. This agency has a special trust. Its duty is to protect the very lives of millions of American workers, and this agency is bound by that duty every working day, regardless of the party of the administration in power.

The record of these hearings will show, however, that this duty, this trust has been abandoned during the last eight years. The agency's own experts and enforcers have testified that they have been stopped in the tracks of their duty. They have not been able to set standards. Rather than produce meaningful limits on life-threatening hazards, they have been instructed to generate misleading data that give the appearance of zeal as a cover for neglect.

The effect of this broken promise is not simply to offend some brooding congressional intent; the effect is not merely to disappoint the expectations of experts. The effect is to see workers die.

Today, we have heard from a handful of the survivors of the workers who have died because OSHA did not care. They remind this agency that their failures are not measured in numbers but in the shattered lives and loss of life to many families. We have met a bare handful of OSHA's victims today. These few speak for hundreds and thousands and tens of thousands of Americans scattered thickly across the industrial landscape of this country.

At least one million workers have lost their lives to poisons and hazards in the workplace since this agency came into existence. More Americans have lost their lives in the workplace than have been lost in all of the wars this Nation has fought, and yet this administration has tried to peel back the thin web of protection these workers enjoy.

Tomorrow, we will hear from those in the agency who have ordered the retreat from safety. The questions will not be easy, nor should they be. These survivors have a right to know why their husbands and sons died.

[Additional material submitted for the record follows:]

Additional Documents

1. Testimony of Carol J. Scharf, Dan Scharf, and David Scharf, Campbellsport, Wisconsin relating to the death of Richard Scharf from occupational disease,

2. "The Deadly Dilemma," a report on enforcement of Section 11(c) of the Occupational Safety and Health Act prepared by the Wisconsin Committee on Occupational Safety and Health. Report submitted at the request of Congressman Jim Moody.

3. Resolution 8711 of the American Public Health Association entitled "Enforcement of Occupational Safety and Health Standards." Resolution notes the decline in efnrocement activity under the Reagan Administration, and urges that enforcement personnel be increased. The resolution also makes recommendations about inspection priorities, budget needs, and the authority of inspectors.

4. Resolution 8712 of the American Public Health Association entitled, "Revising Occupational Health Standards." Resolution observes that the standard setting process at OSHA is inefficient, poorly coordinated, and often takes years. The Association urges Congress to consider legislation which would speed the standard setting process.

5. Resolution 8716 of the American Public Health Association entitled, "OMB Abuse of the Paperwork Reduction Act." Resolution calls upon Congress to ensure that OMB does not exceed the authority granted under the Paperwork Reduction Act in order to weaken or block occupational and environmental epidemiologic studies.

6. Report prepared for the New Jersey Department of Health by Martha Stanbury, M.S.P.H, Kathleen O'Leary, M.S., Marcia Goldoft, M.D. entitled "Data sources for a fatal occupational injury surveillance system," July 1987.

7. Documents relating to the exclusion of employees and employee representatives from closing and settlement conferences between the Occupational Safety and Health Administration and General Dynamics.

8. Correspondence between the Occupational Safety and Health Administration and the United Paperworkers International Union relating to the settlement of OSHA citations for recordkeeping and safety violations against the Scott Paper Company.

9. The medical records of Mrs. Gloria Hanson have been retained in the Committee's files. Mrs. Hanson works in the meatpacking industry and suffers from carpal tunnel syndrome.

10. Report from Congressional Research Service requested by Senator Kennedy entitled "OSHA Safety Inspection Targetting: Causes and Effects." Summary of key findings prepared by the Congressional Research Service is also included.

RE: Work related illness and subsequent death of Richard A. Scharf.

Richard (hereon refered to as Dick in this statement) was employed by Cedar Tool LTD. in Cedarburg Wisconsin. His full time employment as a working supervisor began in April of 1979. The description of his job was 40 to 50 percent actual working in which he was sawing material, Washing materials in solvent and mixing solvent for other workers, and inspecting. 20 to 30 percent of his time was spent working on other machines and 20 percent on shipping and recieving. The material he lifted ranged in weight from 40 to 200 pounds.

Dick's physical appearance started to deteriorate almost immediately after beginning employment with Cedar Tool. Dick was a muscular man standing 5'10" tall and weighing 180 to 190 pounds at any given time. In May of this same year a new suit was purchased. On August 6th of 79 Dick had occassion to wear this suit. It was at this time that we noticed he had lost mass and muscle as evidenced by the fit of the suit. It literally hung on him. Every year Dick put in a large garden. He had a hand tiller for gardening but due to his physical condition he opted to borrow a tractor which was offered by a friend. because he could not operate the tractor this years garden would be prepared by our son David.

July 4th of 1979 the owner of the company along with his wife visited our vacation home. The wife had indicated that she had noticed the physical deterioration. She stated that she thought Dick had "aged so". It was also during this summer that I noticed Dick frequently shaking his hands. When I inquired as to why he indicated to me it was because they hurt and were starting to go numb.

By fall of 1979 Dick's hands and forearms were completely numb. He looked and felt sick. I had been packing aspirin in his lunch for several months as he complained of headaches and nausea. I later found that often times he ate very little of his lunch if any at all. I finally persuaded him to see our family physician. Up until this situation Dick had been so healthy he rarely saw a doctor. At this point I think it is important for you to know that Dick built most of the two homes our family lived in and nearly all of our vacation home with help only from myself and our two young sons. He was self employed in the insurance business until his employment with Cedar Tool.

Our family physician Dr. Castro sent Dick to a Dr. Bhatti, An orthopedic surgeon. Consequently surgery for carpal tunnel was schedualed. This surgery had been delayed due to some infection that showed up in blood work as well as a nagging temperature. Upon starting his job at Cedar Tool Dick had a great thirst and

(All numerical references made in this statement, which are in parenthesis, are endnotes refering to enclosures and are detailed on the page entitled "Endnotes".)

consumed larger than normal amounts of coffee and other liquids.(1) Upon arriving home he would request a large tumbler of ice water. Although dinner was always ready when Dick came home he would have to rest first and see if he felt like eating. There were times when I was confused because one would have thought he was mildly inebriated but I knew better because Dick would never drink that much on a daily basis. On occassion Dick would stop with the owner after work and have several glasses of beer, 4 or 5 - 6 oz. glasses. (Theda Clarke medical institute would later claim that any neuropathy that Dick might be suffering from was caused by this.) (2) Later the consumption of beer would be replaced with coke as the beer became unsettling for Dick. This was the beginning of the manifestation of the poisoning. The surgery on the right hand was performed in November of 1979 and the left hand was done in February of 1980. Dick saw Dr. Bhatti often because there was no improvement, in fact rapid deterioration continued. It was in 1980 that he became numb all the way from the middle of his chest down to and including his feet. He continued to see the doctor who prescribed vitamins and medication for circulation to no avail. His walk was now affected having an unsteady gate. Doctors were first now beginning to realize that his condition could be of a more seriouse nature. He was checked for Multiple Sclerosis and Parkinson's Disease.

In January of 1981 Dr. Castro refered Dick to Dr. Friedman, a neurosurgeon. After several nerve conduction tests Dr. Friedman noticed a discoloration on Dick's palms. Dick apologized for their appearance explaining that this would not wash off. The nerve tests I am speaking of were extremely expensive and insurance covered only a small part of them. We paid these bills and all the rest along the way because Dick was a proud person and did not believe in debt. He would see Dr. Friedman on his way home from work. Often times one of our sons would meet Dick at at these hospital visits to help him unbutton and button his shirt for the ride home as it was winter time. Dick wore boots with zippers that were never zipped. Please understand that during this period things such as buttons, zippers, and belts were objects requiring dexterity that Dick no longer posessed. Dr. Friedman and Dr. Castro concured that he should be hospitalized for more tests. Among these tests was a urine test for heavy metals poisoning. Heavy metals tests revealed high levels of zinc and cadmium.(3) We later learned that any amount of cadmium was too much. It was also at this time that Dr. Friedman related that he believed that Dick was taking hydrocarbons into his body. Dr. Friedman suggested that Dick wear gloves, however there were no rubber gloves and other gloves were kept in the office and given out sparingly as they were treated like a rare commodity.(4) This news was our first indication that what was happening could be work related.

If you have been paying close attention to the text of this statement thus far, I would ask you to note that at this point in the story more than two years have passed since we first noticed that Dick was sick. It was two years before any medical practitioner of three had even suggested that Dick's illness was work related. Perhaps even more appalling than this is that even though workman's compensation claims have been litigated to near full extent, to my knowledge, the shop in question still has not been inspected by any government authority.

By early summer of 1981 Dick had submitted papers for warkman's compensation. Sentury Insurance, the workman's compensation carrier in the State of Wisconsin and financier of Theda Clarke hospital, requested that he submit himself to evaluation by Theda Clarke Hospital in Neenah Wisconsin. Dick was against the Theda Clarke visit but was persuaded to go by the rest of the family as we were becoming desperate for help and believed this was our answer. As it turned out Theda Clarke would have you believe that this veteran of two wars, this builder of homes, this person of business, was a malingerer. To say the least this experience was degrading for our family and especially so for Dick. Dick took the name TRICLORETHYLENE as well as names of other chemicals from containers found in the shop. When presented with the names of chemicals and metals from the shop, Theda Clarke representatives told us within a matter of minutes that none of these substances could render Dick's symptoms. We now know, among other facts, that Triclorethylene is a known carcinogen. It should further be known that when checks were made with solvent suppliers that exact contents of such solvents would not be revealed.

Although Dr. Friedman predicted that Dick would be totaly disabled, Theda Clarke Hospital contended that there was nothing wrong with him and he should go back to work. Dick was discharged from the Theda Clarke visit on a Thursday and took that Friday off returning to work on the following Monday. By the end of the week Dick was so exhausted that he would have to stop the car to rest on the way home and upon arriving home would have to get out of the car and rest sitting on the lawn before entering the house and even then only with the help of one of us. I contacted Dr. Castro at the end of this week to advise him of the decline of the situation. Dr. Castro issued a firm order for Dick not to return to work due to the correlation of the condition to his work.

We now began searching the libraries for any information on solvents and heavy metals which the doctors could tell us little about. At this time we recognized the observation that there was a correlation between the physical imparment of Dick's right side and a rag which was kept in his right hip pocket.(5) Dick's right hip and leg was most impaired and had taken on a deep red complexsion. The rag which was kept in his right hip pocket was constantly saturated with solvent which had been wiped off of parts that Dick washed. Dick talked of the strong odors in the shop and that there was no exhaust system except for some circulation fans.(6) He also related that OSHA could never had inspected the shop as they would never have approved of such conditions.(7) The solvent tank (8) that Dick worked with was always open and much of the time was a few feet away from his office cubicle which had no door and was open on the top.(9) We retained the services of a lawyer who encouraged us to search for more information but did nothing to help us, not even submit a claim for workman's compensation benefits. At this time Dick's employer cancelled his health insurance. The Sentury Insurance company did offer another health insurance policy but the premiums were well out of our economic reach.

It was a difficult thing to see the legs of a strong man, marred, bruised, and blodgeoned from walking into metal structures he could no longer feel. It was equally difficult to lay next to this man at night and feel his legs twitch uncontrollably due to nerves that were slowly dying. At home we would have to caution Dick not to touch hot dinner dishes. He still suffered burns from not being cautioned in time or from cigarettes that had burned too far. Glasses and dinner utensils were dropped to the floor frequently. When you suffer from this type of poisoning you see, your brain does not adapt easily from the many years of learned behavior which teach you to depend on the sense of touch and feel. Soon the entire family would realize the limitations that Dick suffered from, and the task of filling his dinner plate and cutting his meat would be executed by that person in the family who could handily perform this task first.

At this point yet another stay in the hospital was prescribed where many tests were performed including a lumbar puncture which verified a toxicity. It was also during this stay that a carcinoma on the skin on the right temple was diagnosed and removed. After this stay in the hospital, and based on the tests performed, it was suggested to Dr. Castro by Dr. Friedman that a chelation therapy be performed. Back to the hospital for another week. A needle was inserted in his arm and for several hours each day a solution was pumped through his veins by way of a timed mechanism. Doctors and nurses monitored Dick constantly asking him if he felt any discomfort such as dizzinesss and nausea. At the time Dick did not feel any such discomfort but later experienced periodic episodes of double and blurred vision and his right hand would shake uncontrollably from time to time. If these episodes would occur while driving Dick would pull over, if while watching television he would cover one eye. Upon learning of this development Dr. Friedman suggested that Dick see an opthomologist. We saw a Doctor Gager of Medical Eye Associates located on Wisconsin Avenue in Milwaukee Wisconsin. Dr. Gager found metal deposits in Dick's eyes. The same condition was verified by the examination of a Doctor Sweet who investigasted the case at the direction of Social Security Administration regarding a claim which we filed for benefits. Dr. Castro would later hear of these results and speculate that these deposits were in every organ of Dick's body.

We filed for social security benefits and were turned down three seperate times. By this time we were living on our life savings and considered ourselves fortunate for these savings and the fact that we had no debts. State health insurance was taken for myself and Dick said that he would use his eligibility as a veteran to go to V. A. Hospital at Woods Wisconsin if the need would arise.

(Dick had served in the armed forces twice. The first time was near the end of World War II and the second time he was called up from reserves for the Korean conflict.) The next step for Social Security benefits would be a hearing before an administrative law judge. We were allowed attornies in these hearings but Dick thought we could present our case without them. Beside this, we were not at all sure we could afford an attorney. I prayed all the way to Fond du Lac that day, not only for the hearing, but also for our car which was really just limping along now. Though it was difficult for Dick to drive he could still handle the stubborn ways of the car better than I could. The judge who would have ordinarily presided over the hearing that day suffered a heart attack so a Judge Francis J. O'Byrne, from Chicago, presided over the hearing. Judge O'Byrne advised us before going on record that we could postpone the hearing in order that we might retain legal assistance. We were determined to speak for ourselves. Within 10 minutes the judge ruled in our favor. We could not believe this. I called the Social Security office upon returning home and was told a judge would not render a decision until he had reviewed the case in private. We knew what we were told by the judge and it was true. We were granted Social Security in December of 1981, however we did not recieve benefits until June of 1982.

In spring of 1982 Dick invested a good portion of our savings in a gas station. He would not be able to work at the station but he could manage it with the help of our boys. The State of Wisconsin Department of Rehabilitation offered some minimal financial assistance to make some of the repairs that the station needed. Now with some hope of income we bought a 1981 Ford which was a domonstrator. This vehicle represented the only debt that we had at this time but it was badly needed.

Dick took ownership of the station on may 3rd, 1982. This was our second debt. On July 14th, 1982 Dick suffered one of his dizzy spells with blurred vision after our evening meal. He was vomitting and could not stand. I called Dr. Castro and he advised me to get him to the hospital immediately. Our oldest son Dan was home and lifted Dick into the car to drive us to West Bend. Could he have had a stroke?

Dick was in St. Joseph's Hospital for two days. I knew we had to move him to Veteran's Hospital in Wood Wisconsin as we had no insurance to cover a hospital stay. Dr. Castro spent hours on the phone giving information to the people at Veteran's attempting to get Dick admitted. St. Joseph's hospital was anxious to get rid of Dick, I suppose due to the insurance situation, but Veteran's didn't seem to want him either. When we left St. Joseph's we were stopped on our way out, with Dick in a wheelchair, and asked about the bill again. The bill was eventually paid as were they all along the way. Dick was so ill he never remembered the ride to V. A. with Danny driving and me holding him up in my arms.

When we arrived at Veteran's they acted as if they never recieved a call or any of the information Dr. Castro gave them. I got a wheel chair out to the car and Danny lifted him in. He just sort of hung there. We were told to wait first in one room and then in another. When we were finaly called there were endless questions. The entire situation was very discusting. This man was in pajamas and a robe. It was obvious that he needed attention and most importantly a bed to lay down on. Dick was at V. A. three weeks. We took him home the last two weekends. David would put him in the tub and I would bathe him like a baby. I was very thankfull for our new car during this time, having to drive 50 miles each way every day. I tried to get to V. A. Hospital by 11:00 AM each day. This is when the noon meal was served. If I did not arrive by this time Dick would be covered with all the colors of everything he tried to eat. Dick recieved little help at V. A. Hospital. When I sponge bathed him I could see that he recieved little help in the bathroom as well. Dick would watch for me every day and start crying when he saw me coming down the hall because he said he was worried about my driving so far. I never had to drive those distances in Milwaukee traffic before.

Every day I would locate one of the Doctors on Dick's case to try to ask questions. In every situation I was either ignored or told "ask your husband". The speech was affected due to a deviation of the uvula (10) but I could understand him. When I asked him what was said to him he told me that the doctors treated him like a non-person talking to each other, in front of him, but not to him. I begged them to begin some therapy but to no avail. Now that I look back on this I believe the V. A. staff thought he had a psychiatric disorder. There were many tests however the most important nerve conduction test was not done till two weeks after Dick's arrival.(11) It seems the room was being painted and the machine was not set up. Dick and I were with a psychiatrist when someone came to get him for this test. I was told to wait for him. Dick later said that a doctor told him to get out of the wheelchair and walk from the hall into the room. He said he could not. He was again told to get up and walk. Dick said he got up but had to cling to the wall. Dr. Saxena, the Neurologist, then came out and helped Dick. After the test Dick said Dr. Saxina kept saying "man you are really numb". It was found that there was no feeling except in the right shoulder. After this incident Dick was treated with a great deal more respect and therapy was finally schedualed twice a day.

Every day I would give Dick a sponge bath from head to toe, put on clean underwear and pajamas, brush his teeth and do his nails if need be. I also continued to help him to eat leaving for home in the late evening when traffic was not so heavy. I would go with him to therapy and learned easier ways to help him watching from the doorway. On the second or third day of that week the therapist seemed to notice something and I saw her go to her supervisor and tell him about it. The supervisor went to Dick and checked his feet. I then walked over to where the therapist was exercising him and asked her what had transpired. She said that Dick had a peroneal palsy or drop foot. I asked the therapist what could cause this and she replied toxicity.

Later, back in the ward, Dr. Burgarino brought in some students. He took off Dick's left sock and they examined his feet. The Doctor told the students that this was due to "medullary syndrome of Wallenberg" (12) and it was peroneal palsy. I quick wrote this down and when Danny arrived for a visit we went to the hospital library and searched through books which two librarians helped us find. "The Neurologic Examination" (third edition by Russel N. De Jong M.D. - Hoeber page 345 paragraph 2) defines lateral medullary syndrome as a primary lesion affecting the fifth cranial nerve. This, "and many other infectious, toxic and degenerative processes", can be manifested in the poliencehlograph inferior. Dick did not have a stroke.

At the end of the third week, with therapy twice a day, Dick could walk with the help of arm cains and insisted that we not take the wheel chair, which was assigned to him, home with us. So with a list of exercises, including crawling forward and sideward like a baby, we took the last ride home from the stay at V. A. Hospital. I helped Dick with bathing, dressing, eating and such things for a long time. Now I would have to do everything for him. We were able to learn from the therapist easier ways for Dick and I to accomplish certain tasks without the help of the boys. For instance, getting in and out of the tub was a great deal more work but at least we could do it ourselves.

We returned to Veteran's Hospital periodically for check-ups, blood tests and x-rays. After a brief period of this we were told that if any problem should come up to see our family physician. In the meantime we retained the services of another attorney and a claim for worker's compensation was finally filed. By the time of the first compensation hearing in November of 1984 Dick was dying. He had developed cancer of the colon. The death certificate listed carcinoma of the colon with liver metastasis, severe jauntice, hepatic failure, lateral medulary syndrome, and peripheral neuropathy.

Nerve tissue samples were removed from Dick's body and an in depth study of these samples was made by Kenneth Siegesmund, Ph. D. Of the Medical College of Wisconsin. Dr. Siegesmund's Curiculum Vitae is extensive and dates back to 1955. He is nationaly renown for his work in pioneering modern technic in the use of the electron microscope.

Dr. Siegesmund's report reads in part: "Examination of the tissue by electron microscopy revealed severe damage to myelinated axons. Myelin lamellae appeared to be unraveling and ballooning. Some dense deposits, possibly organic toxins, were seen in a few of the axons."(13)" Axonal swelling was seen in many of the larger axons. The damaged axons and the severe degree of myelin disruption is suggestive of a perhipheral ~~neur~~neurotoxin."

"The above ultrastructural patholgy is similar to that described in numerous hydrocarbon neuropathies. Although the damage cannot be identified with any particular hydrocarbon it is consistent with hydrocarbon toxicity in general."

"In conclusion it is my opinion to within a reasonable degree of scientific certainty that Mr. Scharf's neurapothy was caused by either Stoddard solvent or tricholorethylene cleaning compound. I would also be of the opinion that had Mr. Scharf survived, his neuropathy would not have improved and could have become more serious due to the presence of the toxin in the nervous system."

A Dr. Burton Waisbren M.D. also assisted us with a case study. Dr. Waisbren is of the Waisbren Clinic specializing in internal medicine, infectious diseases, oncology and immunomodulation therapy. His Ciriculum Vitae is also extensive and dates back to 1944. Among Dr. Waisbren's accomplishments are Director, Infectious Disease Control Lab., Milwaukee County Hospital, 1951-1969. Internist and Director of St. Mary's Hospital Burn Center, 1961-1982. Associate Director St. Mary's Burn Center, 1969-1982. Director, Clinical Cell Biology Lab. of Mount Sinai Medical Center, 1976:1979.

Dr. Waisbren's report reads in part: "In summary we have a man with documented evidence of generalized nerve damage due to some toxic product. Aromatic hydrocarbons, zinc, cadmium, or virus induced by aromatic hydrocarbons are all possibilities."

"He categorically did not have Guillian Barre Syndrome or infectious mononucleosis. Finally there is a medical certainty that his problem was due to an industrial exposure that caused myelin deterioration."

What a difference could there have been if an agency such as O.S.H.A. would have ful-filled there assigned task in this one small shop, as well as the thousands of small and large shops throughout the country. If precautions would have been spelled out, exhaust and vacumn systems, labels on chemicals telling of there dangers and consequences, and these precautions reinforced by inspections, maybe we could have saved a life. Maybe it is still not too late to save hundreds. Instructing employers of the seriousness of all these circumstances, and imposing fines for unsafe conditions can and will help. But only if you help. Dick Scharf is gone but if, by telling this story, action can be implemented to improve conditions in the work place, many along with me will sleep a little better with peace of mind.

In closing let me relate the elements of reality as I have observed them. In the area of work safety, justice is an unaffordable myth; The certainty of medical science is but a dream; Prevention is certainly, not as yet, in the hands of you, our most learned governers; And it appears that still the solution is only the incubation of a foggy principal found in the lofty ideals of some first year legal and medical students. As some people rise in the morning and make their way to wark, much like lambs being led to slaughter, let us hope that these ideals are not strangled by the profound ignorance of society.

Some people talk and say nothing. Most poeople listen but do not hear. Still I must ask please, please let not this plea of desperation fall on deaf ears once more.

Respectfully Submitted

Mrs. Carol J. Scharf
Mrs. Carol J. Schaerf (widow)

Daniel A. Scharf
Daniel A. Scharf (son)

David R. Scharf
David R. Scharf (son)

CJS/drs

JIM MOODY
WISCONSIN

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March 29, 1988

The Honorable Edward Kennedy
Chairman
Committee on Labor and Human Resources
428 Dirksen Senate Office Building

Dear Senator Kennedy:

I understand that the Labor and Human Resources Committee will soon conduct OSHA oversight hearings and it will not focus on section 11(c) of the Occupational Safety and Health Act.

The Wisconsin Committee on Occupational Safety and Health has recently concluded a study on OSHA's protection of a worker's right to a safe and healthy work environment. I want to urge you to include a copy of this study, "The Deadly Dilemma," in its totality in the official committee report.

"The Deadly Dilemma" focuses on section 11(c) complaints. It presents deeply disturbing evidence that OSHA has been negligent in fulfilling its role in protecting the rights of workers.

WISCOSH reviewed 249 cases of workers who have filed 11(c) complaints with the Milwaukee OSHA office regarding the conditions of their workplace, and found that 216 (over 86%) were withdrawn or closed. Evidence demonstrates that OSHA did not take the workers claims seriously and even went so far as to discourage workers from pursuing the claims at all. In fact, the few cases in which the workers actually won, were won in spite of OSHA, not because of it. I am sure that you will agree that these findings are very troubling.

Thank you for your consideration on this matter.

Sincerely,

Jim

Jim Moody
Member of Congress

enclosure

THE DEADLY DILEMMA

When OSHA Fails to Protect the Worker's Right to a Workplace Free of Health & Safety Hazards

a report from
The OSHA Watchdog Project
of WISCOSH, the Wisconsin Committee on
Occupational Safety and Health
1334 S. 11th St., Milwaukee WI 53204
(414) 643-0928
copies available for $5.00

by
Joan M. McManus

November 15, 1987

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WISCOSH thanks the following people, who gave countless hours of their time, energy, insight and humor to the work of reading and recording data from the hundreds of OSHA 11(c) files that were the basis for this report.

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Joe Zanoni

We also appreciate the financial assistance of the Wisconsin Community Fund, whose grant to WISCOSH last year allowed us to organize the OSHA Watchdog Coalition, which initiated this study. Thanks, too, to Larry Miller and Joe Zanoni, who co-chair the coalition; to attorneys Mary Elsner and Judy Kuhn, who prepared the Freedom of Information Act request for us; and to Congressmen Gerry Kleczka and Jim Moody and their staff for helping us get the FOIA fees waived.

Our special thanks go to all the workers whose OSHA case files were studied in preparing this report. They went through the ordeal themselves, while we only studied it and wrote about it. But if this paper helps others deal successfully with OSHA, their experiences will have been worthwhile.

DISPOSITION OF OSHA 11(c)CASES

TOTAL CASES	249	- 100.0%

WON	15	6.0%
LOST	18	7.2
WITHDRAWN OR CLOSED	216	86.7

REASONS CITED BY OSHA, USUALLY MORE THAN ONE:

SCREENED OUT	65	32.7%
NOT ENOUGH PROOF	59	29.6
UNPROTECTED ACTIVITY	26	13.1
TOOK ELSEWHERE	23	11.6
UNTIMELY	20	10.0
PERSONALITY CONFLICT	6	3.0

REPRESENTED BY UNION	39
REPRESENTED BY LAWYER	9

OSHA INSPECTION DONE	50	20.1%
CITATIONS ISSUED	105	
PENALTIES ASSESSED	15	CASES
TOTAL CITATIONS ASSESSED	70	
AVERAGE PENALTY	$74	

SUMMARY

Every year, it has been estimated, 117,000 American workers die from work-related health or safety hazards. This report describes the deadly dilemma workers face today: Risk your life by continuing to work in hazardous conditions, or risk your job by trying to get your employer or OSHA to correct the situation.

The federal law creating the Occupational Health & Safety Administration guarantees people the right to a workplace free of "recognized hazards that are causing or likely to cause death or serious physical harm." The law also protects workers from employer retaliation if they complain about working under hazardous conditions. And, it provides a way for them to obtain remedies such as back pay when employer retaliation does occur.

WISCOSH, the Wisconsin Committee on Occupational Safety & Health, filed a Freedom of Information Act request in December 1986, seeking copies of five years' worth of worker complaints of such retaliation filed at the Milwaukee area OSHA office under the provisions of section 11(c) of the OSH Act. By August 12, 1987, 249 of those case files had been delivered to WISCOSH.

We found overwhelming evidence that OSHA not only fails to take worker discrimination complaints seriously, it seems to do everything possible to discourage and deter workers from pursuing such complaints at all. In the handful of cases, 6 percent, where workers won reinstatement and back pay, the key factors were a strong union and an intense personal determination not to give up.

People who won, won largely in spite of OSHA, not because of it.

We also found evidence of questionable conduct by OSHA officials. In particular, we found that at least twice, the OSHA Milwaukee Area Office Director, in violation of the OSH Act, revealed the names of two complainants to their employers as being the ones who had called OSHA to inspect their workplaces for specific health or safety hazards. OSHA investigators seem to have attitude problems, too: Some appear to view their role as that of protector of the status quo, and view workers concerned about on-the-job hazards as nuisances or troublemakers.

WISCOSH's recommendations for improving workers' chances of winning employer discrimination cases do not assume that the mere publication of this report will cause OSHA to reform itself. Rather, we focus on what COSH groups, unions and citizen groups locally and nationally can do to reform OSHA's 11(c) process and strengthen their own efforts to more successfully pursue the rights guaranteed to them by federal law.

INTRODUCTION

> "On the day of the accident...I was working as the hydrocrane operator on the East Chopper. I last saw [deleted] about 4:10 p.m. He was waiting for the maintenance man to finish repairing one of the choppers.
>
> "At about 4:50 p.m., [deleted] asked me where [deleted] was. I said I thought he was in the bathroom. A few seconds later I decided to check where [deleted] was.
>
> "I found him lying between the belts at the west end of the West Chopper. His left arm was wrapped around the drive roller. As soon as I saw him, I ran around to shut off the conveyor, and all the other 'off' buttons. When I got back, I found the drive motor was still working. As [deleted] came around the conveyor, I was trying to cut the belt with a knife that I found nearby. The knife was dull and would not cut. [Deleted] and told him to call an ambulance." Case #83-048, Peter Cooper Corporation

Following that accident, a Cooper employee called OSHA for an inspection which resulted in five citations and a $1,360 fine (later reduced to $136.) During the inspection, another employee revved the motor of his payloader so the OSHA inspector could see the exhaust fumes. Management told him to shut off the motor; he did. The next day he was given a three-day suspension for abuse of company property. A few months earlier, he had called OSHA to inspect after the company had failed to correct inoperative safeties on several cranes; management knew he had called. He believed the suspension was for his health and safety activities, in violation of federal law, so he filed what is known as an OSHA 11(c) complaint. He won reinstatement, and his record was erased -- but his union won it for him, not OSHA.

Section 11(c) of the federal Occupational Safety and Health Act of 1970 was written into the law to provide protection for workers who complain to an employer, their union, their co-workers or the government about health and safety hazards in the workplace.

The law states that employees cannot be fired or discriminated against in any way for asserting their right to "...a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm."

It then adds further protection: Employees who believe they have been fired or discriminated against because of health and safety activities on the job can file an 11(c) complaint with OSHA. Theoretically, OSHA will then investigate the complaint and, if investigation shows the employee has been discriminated against, the Secretary of Labor "shall bring an action in any appropriate United States district court against such [employer.]" Among the remedies available to employees are reinstatement or rehiring, back pay and purging of personnel records.

It sounds good on paper, but like many things intended to protect the rights of ordinary working people, it doesn't always work the way it should. In fact, the Peter Cooper employee described above was one of only 6% in this study who won their 11(c) cases.

This report describes how workers' rights too often go unprotected by the provisions of Section 11(c), why that is the case, and how workers can best protect their rights when they do ask OSHA for help.

On December 9, 1986, WISCOSH, the non-profit Wisconsin Committee on Occupational Safety and Health, filed a Freedom of Information Act request with OSHA for copies of 11(c) complaints filed with the Milwaukee Area Office since 1983 because, according to the formal request:

> "[W]e have received repeated complaints from our members that OSHA is not investigating or enforcing Section 11(c) of the OSH Act, and that OSHA is discouraging the filing or pursuit of meritorious claims without sufficient investigation. We are trying to determine whether these allegations are true...."

After much delay -- and considerable wrangling over whether our request would benefit the general public, thus allowing a waiver of fees estimated at over $1,000 by Fredric Deeley, an 11(c) Supervisory Investigator for Region V -- Congressmen Jim Moody and Gerald Kleczka intervened in February, 1987. Even with their efforts on our behalf, it took OSHA until the beginning of April to respond to WISCOSH's request to waive fees and release the files.

When OSHA did respond, half of their letter was devoted to explaining why they hadn't originally granted our waiver request. The rest was a clear attempt to convince WISCOSH that pursuing its request for the files would not be worthwhile. Because of limits imposed on OSHA by the Privacy Act and the Freedom of Information Act, Deeley wrote, "...we are concerned that case files would be 'sanitized' to the point that little information of value would remain."

In other words, as this report will make clear, OSHA attempted to do to WISCOSH what it does to its 11(c) complainants: discourage, deter, and delay until no alternative remains, and then -- reluctantly -- deliver. Finally, on May 15, 1987, the first of ten shipments of 11(c) case files were delivered to the WISCOSH office.

On August 12, 1987, the last of the ten arrived: 249 case files in all. They are not all the 11(c) complaints filed with OSHA during the time period in question, simply the ones OSHA sent us.

"Sanitized" they were, as Deeley had predicted; but his other expectation, that little information of value would remain, did not even come close to being the case. In fact, the most difficult part of preparing this report was deciding which "information of value" to cite and which to omit.

Individuals' names were deleted by OSHA under provisions of the federal privacy act. In some cases, complainants had contacted WISCOSH as well as OSHA; we have used some of their names with their permission. [Curiously, out of seven cases in which WISCOSH worked directly with the 11(c) complainant, our FOIA request to OSHA produced a case file on only one.]

FINDINGS

Complaints filed under Section 11(c) are resolved by OSHA investigators in a number of ways. Cases can be screened out, dismissed, administratively closed, withdrawn, lost or won -- all for a variety of reasons: filed after the statutory 30-day deadline, taken to another agency, resolved by a union grievance, dismissed for lack of sufficient proof, dismissed for lack of any protected activity, or screened out almost immediately -- for any of those reasons, but usually for insufficient proof or unprotected activity.

The latter two are the reasons WISCOSH encountered most often in its analysis of the OSHA case files, accounting for nearly half of the 216 complaints that were not definitively won or lost. And it is these two reasons which account for the high level of frustration expressed by those workers whose case files we analyze here.

Reading the files makes it abundantly clear that workers who call for OSHA health or safety inspections at their workplaces and then file 11(c) complaints with OSHA may well be putting their jobs on the line by doing so.

But it is also clear that they go to OSHA in good faith, expecting that something will be done to correct the hazardous conditions they complained of, and that something will be done to protect their right to make such complaints without employer retaliation.

Reality -- as demonstrated in the files WISCOSH examined -- falls far short of those fully justified expectations. The files reviewed by WISCOSH reveal the following problems with OSHA's handling of 11(c) complaints.

PUSHING TO DROP CASES AS SOON AS POSSIBLE

Most workers' complaints will be screened out by OSHA on the day they are filed or soon afterward. Many are eliminated for legitimate reasons; but far too many, such as the case described below, are screened out under questionable circumstances.

Employed for 15 years as a maintenance person at Schellgell Food Service in Milwaukee, the complainant serviced food vending machines at factories. On December 8, 1983, he was servicing machines near the welding area at Dickten & Masch, and commented to workers there that the noise from the welding machine was so loud it hurt his ears. The workers replied that they had suffered hearing loss as a result of the noise.

When he went to service the coffee machine in the plant manager's office, he commented on the noise to the manager, who replied that he was aware of it and had ordered a new machine. The complainant saw a pair of ear plugs on the manager's desk, but did not comment on them.

Instead, he went back to the welding area and told the workers that the manager said a new machine was on order; but the workers said they'd been told that for months and didn't believe it. He asked why they didn't have ear plugs and was told that they had requested them several times but had never gotten them.

He returned to the plant manager's office to finish working on the machine there. He told the manager that the ear plugs on his desk were very effective ones and that he serviced machines in a place that had plenty of them. He offered to get some for the manager.

The manager became angry and told the complainant that he had no business talking to his employees and asked him who he thought he was to be disrupting his work force. The complainant did not reply, but simply left the office.

Later that day he was informed by his employer that he was to attend a service meeting that afternoon. He told his employer he would not be able to attend because of an appointment at his bank. The next day he was fired. His employer said he was fired because he failed to attend the service meeting and because he had been late for work once nine months earlier.

It was not until January 17, when he attended his unemployment compensation hearing, that he learned the real reason for his firing: Dicksen & Masch had told his employer that if he was not fired, they would withdraw their business from Schellgell.

He called OSHA a week later and "was advised by this investigator that one must file within 30 days of the adverse action, however, his circumstances, subject to review of the [supervisory investigator,] may toll [extend] the filing period."

Six days later, Jim L. Sumpter, an OSHA supervisory investigator, wrote the complainant to tell him that "...your allegation would not constitute a violation of Section 11(c)(1) of the OSHA Act....this file has been administratively closed." Case #84-026, Schellgell Food Service

PRESSURING PEOPLE INTO WITHDRAWING COMPLAINTS

In general, workers who complain to OSHA will continue to be pressured by investigators to withdraw their complaints or let them be closed administratively by OSHA, because success at OSHA means a closed case. In this study, 86.7% of the 249 cases were withdrawn or closed by OSHA. In many of these cases, the amount of time and energy people put into working on their complaints makes it clear that they withdrew only out of total frustration with OSHA.

[Deleted] used the Right to Know law to find out whether the chemicals he worked with at Rose Plastics were causing his breathing difficulties. When he found that they did present health hazards, he and several co-workers also exposed to the chemicals asked OSHA in late March of 1986 to conduct an inspection of the plant. [Deleted] was fired one week later. He describes his experience this way:

> "After I was fired [on April 7, 1986] I filed an OSHA 11(c) discrimination complaint. When I went to file the complaint the first thing I was told was that I probably didn't have enough evidence and I should forget about filing. I told him it was his job to take the complaint and not his job to discourage me from filing a complaint.
>
> "The 11(c) investigator met with me at my home. He took most of the evidence I had. He also stated I probably didn't have enough evidence. He said that it is a long process to prove why I was fired. He was trying to discourage me from filing the complaint.
>
> "On August 6th I received a letter from him stating that they felt there was no merit to the case and telling me how to appeal the decision, which I did appeal.
>
> "I feel the investigation was not adequate. I feel one key witness was not interviewed, and that this witness would back my story without a doubt." Case #86-020, Rose Plastics.

REVEALING NAMES OF WHISTLEBLOWERS TO THEIR EMPLOYERS

In the cases we observed in which names were revealed, those responsible were supervisory personnel who surely knew that names of people filing complaints with OSHA are never supposed to be disclosed to employers or anyone else without their permission.

> "After the inspection, I went to an informal meeting at the OSHA office. [Deleted] of company management were there. When the OSHA people were ready for us, the one man [Gerald Cunningham, OSHA Area Director] came out where we were waiting and introduced himself. The management people introduced themselves, but before I had a chance, the OSHA man said 'Are you Smith?' I said no, I'm Jones*. The others looked at me with surprised looks on their faces."
>
> * [Not their real names]
>
> Jones was the president of a union local at the Vilter plant. Smith was a former president of another local of the same union who now worked at Vilter. And now management knew that it was he who had requested the OSHA inspection, one which resulted in 12 citations and fines of $780, [later reduced by Cunningham to $60.]
>
> OSHA's own Telephone/Activity Record has this to say: "4/10/4 10:30 A --Jerry Cunningham not aware. States he or Phil would have met people. Based upon numerous contacts with Smith, he believes he may have assumed Jones was Smith but does not recall addressing him as Smith....4/13/4 11 A --Jerry repeats it's possible he did, but can't remember."

Why did it matter if the company knew Smith had called for the OSHA inspection? Smith and several other crane operators had been laid off shortly after the inspection took place; he was still laid off in January when he learned from the union that the company had hired a temporary crane operator instead of calling him back from lay-off. Jones told Smith about Cunningham having used his name in the closing conference, adding that he believed this was why the company had not called him back to work.

Smith filed an 11(c) complaint against Vilter based on that information. Six months later he withdrew his complaint because OSHA investigator Randall Koonce told him that the company did not recall him "for economic reasons." If he had been recalled, the company's lawyers said, in three weeks he would have been out of his probationary period and in the union, thus costing the company $945.36 in medical benefits and floating holidays for three months. OSHA agreed that this was the real reason for not calling him back to work. Case #84-023, Vilter Manufacturing Corporation

Tony Lester, who has worked at the Ladish Company for over 20 years, had a similar experience. He called OSHA for an inspection and was told later by representatives of his union, IAM Lodge #1862, that in their presence, during the closing conference after the inspection, Ladish officials told OSHA's Cunningham that they had "...a pretty good idea who the complainant was....Mr. Cunningham asked them to guess. They guessed it was I and Mr. Cunningham confirmed."

Lester filed an 11(c) complaint against Ladish for harassment due to his past involvement concerning health and safety problems at the plant. He also filed a complaint with OSHA against Cunningham. Both were filed January 20, 1984 with Frank Strasheim, OSHA's regional administrator. By early June, Lester's exasperation with the way OSHA was handling his case was obvious in a letter he wrote to Strasheim:

> "Re: your phone call to me on 6/5/84.
> I would like to respond to the issues that you have brought to my attention and some issues I brought to your attention during our phone discussion:

"1. Your statement that I have lost my credibility with you for sending a letter to Representative Gerald Kleczka. Because of my problems with the Milwaukee OSHA office and your regional office, I still feel that this letter is an accurate account of my problems with OSHA.

"2. Your statement asking me if I'm on a witch-hunt. If trying to make the Ladish Co., my place of employment, a safer place for my brothers and sisters and asking for help for these problems is called witch-hunting, then I will agree with you that this is a witch-hunt.

"3. ....I discussed my case with Mr. Smith on 5/23/84 in which he told me that he is investigating my 11(c) complaint. I asked him about my allegation concerning the Milwaukee Area Director's acknowledgement of the release of my name to the company, and he stated that he was not handling this part. Your 5/17/84 letter states that both cases are the same. I still would like to know who is going to investigate my allegation that the Milwaukee Area Director had acknowledged that I was the complainant.... "I would also like you to know, before you again ask me, that I wrote this letter myself without asking for ideas or input from other safety minded individuals. I hope this will put you at ease somewhat so that if you do call me you will not be so upset as you were in our last phone discussion."

A month later, Lester was informed by Investigator Smith that his complaint against Ladish would be dismissed and that Strasheim would handle his complaint against Cunningham. He filed an appeal notice in August on the Ladish dismissal; that appeal was denied in October. Strasheim told Lester he would "talk to" Cunningham about the matter of revealing Lester's name to his employer. Case #84-022, Ladish Company

ACTING AS AN ADVERSARY, NOT AN ADVOCATE

Most cases seem to be OSHA v. Worker, putting those who refuse to withdraw their complaints through an endless stream of catch-22 situations:

Individual workers who file an 11(c) complaint, but do not file a formal complaint with OSHA related to health and safety hazards on the job, are often told that they have not engaged in "protected activity," even if they did complain to their employer. On the other hand, in cases where workers did file a complaint with OSHA, and their employer did something to retaliate after OSHA inspected the worksite, resulting in an 11(c) complaint, the employer will be notified by OSHA that a complaint has been filed -- giving the employer time to dream up the "real" reason why he disciplined or fired the worker involved.

OSHA then puts the burden on workers to prove that they were really disciplined or fired as retaliation. The agency's excuse for not tracking down witnesses and taking sworn statements from them will be that it is the worker's job to do so and OSHA can't do that job for them.

Confronted with that situation in his 11(c) complaint, Terry Berg wrote this to the investigator assigned to his case:

> "I do not feel it is my duty or ethically, my place, to prompt witnesses or ask them to write affidavits swearing to their knowledge of MCTS actions against me due to my safety activities, although they will, if necessary, if you fail to investigate fully. I feel the investigation per se is yours to design and I feel uncomfortable and inexperienced when you ask me to tell you what to do -- especially since you will not even consider my responses. I believe the legal onus is not meant to fall on the layperson complainant, but on their plaintiff in litigation."

Berg says he still has not been notified by OSHA about the final determination of his complaint. He no longer works for the transit system. Case #86-029, Milwaukee County Transit System

Winning a health and safety discrimination case through OSHA is not easy. Only nine of 15 complainants who won their cases won with OSHA's help. A reading of OSHA 11(c) investigators' final case reports provides one explanation for such a low success rate.

Despite the fact that neither the OSH Act, nor its official regulations, nor the OSHA Field Operations Manual calls for the use of any criteria beyond the need to prove that so-called protected activity took place, in actual practice, OSHA's 11(c) investigators use four criteria in making the decision to close or continue an investigation.

>>PROTECTED ACTIVITY. Workers must be able to prove that they engaged in health or safety activity related to the workplace. And, as noted above, usually the investigator will insist that the protected activity involved calling OSHA for an inspection. In one case, someone other than the complainant had called OSHA, but management thought he, the complainant, had called. They fired him. OSHA screened out his case due to lack of protected activity.

>>EMPLOYER KNOWLEDGE. Next, workers must prove that their employer knew they had engaged in protected activity, something which is difficult to do. An employee of Olsen Auto Supply in Racine injured his knee in a workplace accident and filed for and received Workers Compensation benefits. While recuperating, he called OSHA to inspect the construction site where he'd been injured. They did an inspection in June 1984.

When he returned to work on July 11, he saw his boss, who said to him, "Anybody who calls OSHA need not work for me." The man then told his boss that he had called OSHA, and at that point, according to his sworn statement to OSHA, his boss "...jumped out of his chair and swung at me and called me a 'low life.'" There were no witnesses.

The OSHA Investigator in the case wrote in his Memo to File on the closing conference with the company: "Intent is lacking from the evidence available, because the Respondant [Olsen Auto Supply] denies knowing or mentioning OSHA in any way."

His Memo to File on the closing conference with the complainant reads like this: "By appointment with Complainant, met with him at gas station and restaurant for a Closing Conference. Revealed the results of the Respondant's conference to Complainant, who said he didn't think the Respondant would admit mentioning OSHA." He withdrew his complaint. Case #84-067, Olsen Auto Supply.

>>INTENTIONAL DISCIPLINE. After workers prove they have engaged in protected activity related to the workplace, and after proving that the employer at the workplace knew they had taken the protected action either alone or with others, they must now prove that after the employer knew, he treated the complaining workers differently than he had before -- e.g., not getting overtime any more, being written up for something done many times before without receiving disciplinary action, being laid off and not recalled, being fired.

Another way of proving this is to demonstrate that after the employer knew, he began treating the worker who complained in a different way from how he treats other workers when they do essentially the same things. Whichever it is, workers must show the employer took some step to discipline them and that it was because he knew they had engaged in protected activity.

>>DELIBERATE RETALIATION. OSHA calls this "animus," a Latin

word for hostility. It is a vague criteria as OSHA uses it, because it seems to take the criterion of Intentional Discipline one step further and insist that not only did the employer punish workers knowing they had "protected status," but also that the employer did it on purpose, solely as punishment for health and safety activity.

One good example of how hard OSHA makes it for workers is Case #86-024, Tuf-Seal, a division of the Kelley Company. The complainant had worked as a building inspector and fire inspector and so was acknowledged by OSHA to be more aware than the average person about health or safety hazards. He was active on the company's safety committee and at one meeting he told management that if the weld screen was not repaired within two weeks he would call OSHA on it.

Two weeks later he was fired "for the good of the company." Ten days later, OSHA inspected, found 23 violations and fined the company $350. But the fired man stayed fired. His former employer told the OSHA investigator that he was fired for a "personality conflict not related to safety issues."

The investigator not only took the company's word for it, he also kept telling the complainant that the burden of proof was on his (the worker's) shoulders and OSHA could not do the job for him. He finally withdrew his complaint saying, sarcastically, that he must just have had a personality conflict with his former boss.

In summary, then, workers are far better off if they belong to a strong union with a commitment to health and safety issues, because then, by filing a grievance according to their contract or an unfair labor practice complaint with the National Labor Relations

Board, they can avoid having to rely only on OSHA for protection.

In the cases reviewed by WISCOSH, of the 15 won by the complainant, five were represented by a union and all of those were won not with assistance from OSHA, but solely through a union grievance. One case was won by the complainant alone; it was the only case in the files examined that actually went to court. But it took three years for the case to be concluded, and by the time the complainant had won, OSHA could not locate him to inform him that because the company he'd filed the complaint against had gone bankrupt and its former owner could not be found, he would not be able to collect the back wages he'd won. OSHA closed out the case. Case #81-037, Budget Transmissions.

DOING VERY LITTLE TO CORRECT WORKPLACE HAZARDS

In most of the case files examined, what set the process in motion was the filing of an "OSHA 7" form, detailing specific health and/or safety hazards in the employee's workplace. For the most part, these tend to be fairly serious hazards; the people who fill out an OSHA 7 are doing it because they want OSHA to conduct an inspection and issue citations to their employer which will result in elimination of the hazardous conditions.

What are hazardous conditions?

* At Aluminum Casting and Engineering Company, the roof leaked around the furnaces in the heat treat area, causing slippery floors near the hot water quench tank, which had no cover or guard rail. Workers were exposed to the risk of falling 15 feet into a tank

filled with 140 to 170 degree water. One worker almost did, breaking an ankle in the process. Case #83-033.

* At Fall River Plastics, polyoxymethylene-copolymer was causing upper respiratory tract and eye irritations in workers. The entire plant had been evacuated for about 40 minutes because of fumes from thermal decomposition of the chemical, which results in the release of formaldehyde, a known cancer-causing agent. Case #86-028.

* At Weiland Manufacturing, a worker refused to do any more work inside a tank 11 feet in diameter and 14 feet long, with a 20-inch in diameter hole at the top. He had been wiping down the inside of the tank with xylene, a solvent which can cause dizziness, passing out and death. Repeated exposure may damage bone marrow, the liver, kidneys and the surface of the eye. The company provided the worker with no outside safety person, no lifeline and a paper air mask instead of a proper respirator. The OSHA inspection found no violations for this because the operation wasn't being run the day OSHA inspected. They did not set another date to inspect when the operation would be running. Case #86-010.

* At Universal Foods' Amber Labs facility in Juneau, according to another case file,

> "I was cleaning out a sludge digester that was leased from the city of Juneau on the old wastewater treatment site....[It was taking too long to pump it out, so management decided to have an employee go down and scoop it out in five gallon pails.] He told me it was a dirty job and that someone had to do it and that was me and if I didn't like it I could punch out, that I was done work [fired.] And I told him it was not safe and he insisted that he would not send a man down there if it wasn't safe.

> "I kept on insisting that it wasn't safe, that it was giving off a dangerous gas. He gave me the same answer that he gave me before and he was done talking to me. Then I told him that it looked like I had no other choice, either take my chance in the hole or get fired!
>
> "That's when I came in contact with raw sewage -- human waste. That's when the trouble started. While I was down there, I started to get dizzy and did not have the ability to get out any more [without a safety harness.] I do not recall from then on. This is an account of what my men said happened to me. One said I looked kind of dazed and like I was having coordination problems, so they dropped a plank down in the tank for me to stand on. They said I was still having problems and they were concerned. [Deleted] came down in the tank to see what was happening. I was falling backwards against the plank with my back and even two or three times fell in head-first into the sewage.
>
> "[Deleted], a co-worker, told [deleted], 'My God, do we have to stand here and watch this shit, this is insane, do something!' Then I started crawling up the walls of the tank trying to get out. I was saying 'I have to get out of here' and kept on repeating that. [It took five or six men to pull me out, lay me on the roof and clean the stuff from my face and mouth. A supervisor went up to the plant to discuss what they should do about me.]"
>
> After nearly two hours, the worker finally convinced management to take him to a doctor. The doctor "took one look at me and said, 'Into the hospital immediately.'" He was unable to work for a year as a result of toxic chemical poisoning and oxygen deprivation suffered during the 15-20 minutes he spent in the tank.
>
> He said the tank was about 36'high by 36'wide with a 45-degree cone-shaped base. It had one man-hole 4' by 4', and a wood top with about six square feet of open area.
>
> A few months after he returned to work, he complained to management and then to OSHA of exposure to asbestos because of improper asbestos removal methods. OSHA did inspect and issued citations. He was then given two disciplinary notices and filed an 11(c) complaint and a grievance. He won the grievance and the notices were removed from his file. Case #84-056.

In all, OSHA inspected workplaces in only 50 of the 249 cases reviewed in this study to verify the presence of hazardous conditions which violate federal standards. Still worse, in the 50 inspections, only 103 citations were made. Citations accompanied by penalties totalled 70, from 15 workplaces. The total dollars in penalties assessed was $5,231, which comes to an average penalty of $74. And, since OSHA admits they don't keep track of whether or not these penalties are ever paid, we can't say whether these were.

HAVING AN ATTITUDE PROBLEM

In filing complaints involving hazardous work conditions, employees know they are putting their jobs on the line, but they are faced with an impossible choice: complain and run the risk of losing their job, or not complain and run the risk of being injured or killed because of that job.

So when OSHA treats workers who complain as if they are the wrong-doers, it leads to extreme frustration and anger. The attitude of OSHA toward workers is bluntly described by former OSHA 11(c) investigator Richard Murray, in his February 1986 testimony before the Illinois 2nd Congressional District's Citizens Panel on Employee Rights:

"On my first day in 11(c), my supervisor...took me aside and seriously oriented me to the 'real world out there in the streets: 85% of the complainants who come in here are the scum of the earth.' He was dead serious -- and I soon discovered that the office operated on just that premise."

This attitude gets transmitted into the case files when OSHA's 11(c) investigators summarize statements made by the complainant and the company, as these excerpts from a Prange Way Discount Stores file show:

First reference: "...he accidently caused a bulletin board to fall from its mounting. (It had fallen recently before that.)" OSHA intake worker.

Second reference: "...pulled at bulletin board -- angry gesture -- did not realize board was loose -- it fell." First OSHA investigator.

Third reference: "...pried the frame and cover from the employee bulletin board and threw it to the floor. It landed approximately four inches from my feet." Security guard, witness for company.

Fourth reference: "He admitted to damaging the bulletin board, although he said it was an accident. He said he was sorry and wanted to pay for the bulletin board. I told him it was too late to be sorry...." Personnel Manager.

Fifth reference: "...he then told [deleted] 'Wanna know what I think of this place? This is what I think of this damned place,' and then ripped the employee bulletin board off the wall and threw it to the ground several inches from [deleted] feet. A copy of [deleted] statement is enclosed. He subsequently threw several trash containers to the ground and tried to flatten them by standing on them." Letter from company to OSHA.

Sixth reference: "When C walked out of the office, he could not control his temper and he grabbed the Employee Bulletin Board from the wall and threw it to the ground saying something to the effect that 'This is what I think of this place.'" Second OSHA investigator's memo to file.

Seventh reference, in the OSHA Final Investigative Report: "Outside of the Personnel office, he grabbed the bulletin board from the wall and threw it to the floor stating that 'This is what I think of this place.' He then proceeded to throw or kick the trash cans."

The case was dismissed by OSHA. Case #84-037.

Richard Murray, the former OSHA 11(c) investigator, says that most of OSHA's investigators are retired military and civilian police officers. That goes a long way toward explaining why they treat 11(c) cases and complainants as they do -- many people in those jobs believe that their role is to preserve and protect the status quo. Workers who insist on their right to a hazard-free workplace are -- to OSHA -- at best, time-consuming nuisances, and at worst, rabble-rousing troublemakers with a personal vendetta against OSHA.

With attitudes and practices such as those detailed above, it is not surprising that so few 11(c) complaints are resolved in favor of the worker. But despite the odds, WISCOSH believes that there are ways workers can improve their chances of winning their law-given right to a job in a place that is not a hazard to their lives.

RECOMMENDATIONS

Our recommendations focus on work that can be done by unions, individual workers, citizens groups and health and safety agencies such as WISCOSH and the other COSH groups around the country. We suspect that what we found in Milwaukee is similar to what would be found in any other part of the country, and we have made these recommendations with that in mind.

1. UNIONS. It rapidly became clear in our analysis of the case files that having a strong union with a serious commitment to the health and safety of its members is absolutely essential in dealing with OSHA -- and in using the grievance procedure to avoid having to deal with OSHA at all.

Therefore, we recommend that unions put a very high priority on building strong and knowledgeable Health & Safety Committees, using WISCOSH and this report as resources.

We also recommend that unions ask their attorneys to become familiar with the 11(c) process so that they can be of more assistance when a member is caught up in OSHA's web.

2. WORKERS NOT IN UNIONS. It also rapidly became clear that workers in non-union shops are terribly vulnerable. Their workplaces tend to be more dangerous in the first place, and when they complain they are much more likely to face employer retaliation than are union workers. OSHA knows they are fighting on their own, and sees them as fast screen-outs because of it.

We urge concerned workers in those plants to use health and safety hazards in the plant as an organizing tool to get a union started. WISCOSH is prepared to help in any way possible, including getting you in touch with unions organizing in your area.

Workers should write up a complete description of what the health or safety hazard was, what they did about it, and exactly what the employer did to retaliate against them. It is important to write it up as soon after it happens as possible. If there were any witnesses, get them to write up what they heard and saw take place. WISCOSH can help here, too.

Once you begin dealing with OSHA, give serious consideration to letting your Congressperson know about your case. Frequently they can bring pressure to bear on OSHA, making them take your case more seriously.

Finally, if it is a serious complaint with a substantial amount of back pay as a possible settlement, consider hiring a lawyer. WISCOSH can provide names of lawyers who are pro-worker, who know labor law and who will sometimes take cases at no charge.

3. OUTSIDE SUPPORT. The need for educating unions and workers on how to file and fight for an 11(c) complaint at OSHA is tremendous. We need to do as much as possible to publicize this report as a way of increasing the general public's awareness of workplace health and safety hazards and of OSHA's unwillingness to take workers' complaints of those hazards seriously.

An advocacy project or a panel of volunteer lawyers must be organized to be available to workers regularly, helping guide them through the OSHA process. No one should have to do an 11(c) complaint alone, without access to guidance from people who know the process and are on the worker's side.

A support network for people involved in 11(c) complaints also needs to be organized. This should be made up largely of people who've already been through the process and understand the incredible frustration it causes. Such a network could also function as a resource for organizing at non-union shops where, as stated above, major workplace hazards exist and retaliation is prevalent.

4. CONGRESSIONAL ACTION. Unions, individuals and political action organizations need to push Congress to change the OSH Act:

a. Currently, a complaint needs to be filed within 30 days of the act of discrimination. That time should be extended to the 90 days required by the NLRB in similar cases.

b. Currently, OSHA is not obligated to inspect plants involved in 11(c) complaints. We believe the statute should be amended to mandate automatic inspections in such cases.

c. Currently, the remedies available to workers in 11(c) cases are back pay, reinstatement, rehiring and purging of personnel records. We recommend that punitive damages be available as a remedy and that private legal action against the employer by the employee or the union also be permitted.

d. Currently, OSHA acts as if the worker who asks for an inspection or files an 11(c) complaint is guilty until proven an innocent victim. We recommend strongly that instead, there be a strong presumption that discrimination did occur and the burden of proof is on the employer to show that it did not.

e. Currently, OSHA frequently insists that a formal health or safety complaint must have been filed with them before a worker can fit under their "protected activity" designation. We recommend that the definition be broadened to include other, less formal, health and safety activity. The fact that a worker notices a hazard and expresses concern about it should be adequate.

WISCOSH

The Wisconsin Committee on Occupational Safety and Health is a non-profit organization made up of workers, unions, attorneys, medical and health and safety professionals concerned with improving occupational safety and health. Since 1979, WISCOSH has conducted health and safety educational programming for workers throughout Wisconsin. WISCOSH programs, publications and technical assistance are designed to aid workers in hazard identification and to outline effective strategies for workplace change.

8711: Enforcement of Occupational Safety and Health Standards

The American Public Health Association,

Having endorsed strong standard setting and a vigorous inspection program by the Occupational Safety and Health Administration (OSHA);[1,2] and

Having opposed the budgetary and administrative attacks on occupational safety and health regulation;[3] and

Noting that the decline in enforcement activity under the Reagan Administration by OSHA has been well documented;[4,6] and

Recognizing that:

- The number of OSHA inspectors has been reduced dramatically;
- OSHA inspections often consist simply of reviews of company-supplied injury data without actual worksite inspection;
- Use of the General Duty Clause was restricted, limiting the ability of inspectors to cite where specific regulations do not exist; and
- Worker complaints to OSHA dropped by 34 per cent, in part as a result of worker recognition that OSHA will not protect them;[4-6] and

Believing that there is a desperate need for ongoing and strict enforcement of the right of employees to a safe and healthy workplace; therefore

Urges the Federal Government to:

1. Increase the number of OSHA enforcement personnel;
2. Restore the authority of inspectors to enforce all of the OSH Act;
3. Develop and implement inspection program priorities based on sound public health principles, not company-produced, potentially self-serving data; and
4. Provide OSHA with the significant increase in its enforcement budget necessary to ensure full implementation of the OSH Act.

References:

1. American Public Health Association: Resolution No. 7111: The Right to a Healthful Work Environment. APHA Public Policy Statements, 1948 to present, cumulative. Washington, DC: APHA, current volume.
2. American Public Health Association: Resolution No. 8221: Occupational Safety and Health Administration Priorities. Op Cit.
3. American Public Health Association: Resolution No. 8108: Budgetary and Administrative Attacks on Occupational Safety and health Regulation. Op Cit.

4. Health Research Group: Decreased Law Enforcement at the Food and Drug Administration and the Occupational Safety and Health Administration: FY 1981-1984. Washington, DC: Public Citizen Health Research Group, 1984.
5. Freese B, Wolfe S: Decreased Law Enforcement at OSHA: FY 1982. Washington, DC: Health Research Group, 1982.
6. Simon P: Reagan in the Workplace: Unraveling the Health and Safety Net. Washington, DC: Center for Study of Responsive Law, 1983.

8712: Revising Occupational Health Standards

The American Public Health Association,

Recognizing that occupational diseases can best be prevented by reducing the exposure levels of workers to toxic agents and processes;[1] and

Recognizing that several existing health standards promulgated by the Occupational Safety and Health Administration (OSHA) have reduced workers' exposures to toxic agents and processes;[1] and

Recognizing that the normal procedures for developing and promulgating such health standards by OSHA have been described as inefficient, poorly coordinated, and often take several years;[1-3] and

Recognizing that emergency temporary standards issued previously by OSHA were insufficient to ensure the health and safety of workers;[1] and

Observing that OSHA has developed completely only four new health standards since 1980;[4] and

Noting that public and private organizations -- such as the National Institute for Occupational Safety and Health, the International Agency for Research on Cancer, and the American Conference of Governmental Industrial Hygienists -- have continued to evaluate the scientific bases for occupational health standards, and to publish lists for many hundreds of toxic agents and processes that require workplace controls;[5-8] and

Observing that the Occupational Safety and Health Act of 1970 provided for "consensus" standards based on the recommendations of private and quasi-governmental standard-setting groups; therefore

1. Urges Congress to pass legislation to require the Federal Government to adopt the recommended standards proposed by the National Institute for Occupational Safety and Health (NIOSH) for 51 agents determined to have "sufficient information to proceed with rule-making to establish a more protective standard";[5]

2. Urges Congress to pass legislation to require the Federal Government to adopt the NIOSH recommended exposure limits and other recommendations for an additional approximately 100 agents contained in the NIOSH Recommendations for Occupational Safety and Health Standards;[6]

3. Urges Congress to pass legislation to require the Federal Government to adopt standards to limit workers' exposures to the technically feasible minimum level for those substances and processes identified by the International Agency for

Research on Cancer to have "sufficient evidence" as animal and/or human carcinogens;[7]

4. Urges Congress to pass legislation to require the Federal Government, for agents and processes that have no exposure levels or standards under the above guidelines, to adopt standards to limit workers' exposures to the levels prescribed by the Threshold Limit Values for 1986-87 of the American Conference of Governmental Industrial Hygienists.[8]

References:

1. Office of Technology Assessment: Preventing Illness and Injury in the Workplace. Pub. No. OTA-H-256. Washington, DC: OTA, April 1985.
2. General Accounting Office: Slow Progress Likely in the Development of Standards for Toxic Substances and Harmful Physical Agents Found in Workplaces. Washington, DC: GAO, B-163375, September 1973.
3. General Accounting Office: Delays in Setting Workplace Standards for Cancer Causing and Other Dangerous Substances. Washington, DC: GAO, HRD-77-71, May 1977.
4. 29 CFR 1910.1200.
5. National Institute for Occupational Safety and Health: The Dormant Standards: Review of Selected Workplace Hazards. Cincinnati, OH: US Department of Health and Human Services, NIOSH, October 1984.
6. NIOSH Recommendations for Occupational Safety and Health Standards. MMWR 1986;35(1S):1S-33S.
7. International Agency for Research on Cancer: IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans. Chemicals, Industrial Processes and Industries Associated with Cancer in Humans. Vols 1 to 41. Lyon, France: IARC, 1971-1987.
8. American Conference of Governmental Industrial Hygienists: Threshold Limit Values and Biological Exposure Indices for 1986-87. Cincinnati, OH: ACGIH, 1986.
9. Doll R, Peto R: The Causes of Cancer. New York: Oxford University Press, 1981;1238-1245.
10. National Institutes of Health: Estimates of the Fraction of Cancer in the United States Related to Occupational Factors. Bethesda, MD: National

Cancer Institute, National Institute of Environmental Health Sciences, National Institute for Occupational Safety and Health, September 1978.

8716: OMB Abuse of the Paperwork Reduction Act

The American Public Health Association,

Noting that the federal government has a responsibility for ensuring safe and healthy workplaces and other environments;[1,2] and

Noting that the White House Office of Management and Budget (OMB), in the name of "paperwork reduction," has blocked or greatly weakened occupational and environmental epidemiologic studies proposed by the Centers for Disease Control, as reported to the US Congress on September 28, 1986;[3] and there is much anecdotal evidence of similar actions with regard to other health risks; and

Noting that OMB has authority to review and approve many data collection instruments and surveys conducted with federal support; and

Noting also that OMB using authority granted under the Paperwork Reduction Act has blocked information collections by the Occupational Safety and Health Administration,[4] the National Institute of Mental Health,[5] and other agencies of the federal government; and

Noting that the Paperwork Reduction Act specifically bars OMB from interfering with substantive policies and programs of government agencies;[6] therefore

1. Calls upon the White House Office of Management and Budget to refrain from interfering with scientific studies of occupational, environmental and other public health problems; and
2. Urges the US Congress to ensure that OMB does not exceed the authority granted under the Paperwork Reduction Act.

References:

1. Levy B, Wegman DH (eds): Occupational Health. Boston: Little Brown, 1983.
2. Occupational Safety and Health Act of 1970.
3. Boardman B, Greaves IA, Levenstein C, Landrigan PJ: OMB Review of CDC Research. Washington, DC: US Congress, Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, September 28, 1986.
4. "OMB and OSHA Clash over Wood Dust Investigation" in Eye on Paperwork v.3 #2, Washington, DC, OMB Watch, February 28, 1987.

5. "Mental Health Services Cost and Use Survey" in Eye on Paperwork v.2 #4, Washington, DC, OMB Watch, April 22, 1986.
6. 44 U.S.C. S 3518 (1980).

Data Sources for a Fatal Occupational Injury Surveillance System in New Jersey

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Reducing fatal occupational injuries is one of the 1990 Objectives for the Nation of the Public Health Service (1). Estimates of the magnitude of the problem nationwide have varied widely depending on the sources of data used for the estimates. The Bureau of Labor Statistics uses a sample of employers' reports to estimate 3100 to 4950 annual fatal occupational injuries in establishments in the private sector with more than 10 employees (2). The National Safety Council estimated 11,200 for 1985 using multiple data sources including death certificates, voluntary reporting by companies who are members of NSC, and other sources (3). The National Institute for Occupational Safety and Health (NIOSH) has recently compiled data from all fifty states based only on death certificates that estimates approximately 7000 deaths per year (4). Several states and one county based study have investigated the universe of fatal occupational injuries using multiple data sources. (5,6,7)

The New Jersey Department of Health recently has developed a state-wide surveillance system for fatal occupational injuries based on death certificates, State medical examiners reports, and data on fatal injury investigations conducted by the Occupational Safety and Health Administration (OSHA). Here we report on the accuracy of case ascertainment comparing the three sources of data used for our surveillance system. By comparing the three data sources, we have been able to evaluate some of the problems in each data source and have developed some recommendations that may be applicable to other states and federal programs which want to conduct fatal occupational injury surveillance.

Methods:

Fatalities were compiled for calendar years 1984-1985. A fatal occupational injury in the New Jersey surveillance system was defined as a death resulting from a workplace injury, excluding cases due to homicide, public roadway and boating accidents, and airplane crashes. Those categories of cases were excluded because two of the available data sources often did not distinguish occupational from non-occupational cases and the third data source did not include them at all. In addition, those categories of cases are included in surveillance programs conducted by the police, the U.S. Department of Transportation, the Federal Aviation Authority and the Coast Guard.

The three sources of data that were used to identify fatal cases were: death certificates, state medical examiner's records, and the OSHA inspections data file - their "Integrated Management Information System" or "IMIS" file. Workers compensation data could not be used to independently identify fatalities because fatalities were not coded as such in the workers compensation computer file.

However, it could be used to verify cases and obtain additional information so long as social security numbers were known from other sources.

Death certificates: Death certificates were identified from the New Jersey computerized death files by a code that indicated fatal occupational injuries.

State medical examiner's reports: County medical examiners in New Jersey are required to investigate all fatal occupational injuries within their jurisdiction. By law summary reports must be submitted to the state medical examiner. Summary reports of all occupational fatalities for the two year study period were manually sorted from approximately 40,000 summary sheets in the state medical examiner's office by reviewing narrative information on each report. The narratives generally contained more complete descriptions of the circumstances of the accident than did the death certificates.

OSHA IMIS file: This is a computerized file of records of all workplace investigations conducted by OSHA area office inspectors, including fatality inspections. Almost all employers in the private sector are covered under OSHA's investigative jurisdiction except where other Federal agencies such as the Department of Transportation have jurisdiction. These employers must report all occupational fatalities to OSHA within 48 hours of death. While OSHA is not required to inspect workplaces where the cause of death has been judged to be non-occupational in origin (for example, heart attacks), the worksites of all traumatic deaths should receive inspections. (From OSHA Field Operations Manual, Chapter 8: "All job related fatalities and catastrophes, however reported, shall be investigated as thoroughly and expeditiously as resources and other priorities permit.")

By a Freedom of Information request we obtained from OSHA a list of all fatality inspections of New Jersey establishments from 1984 to the present. Name of deceased was considered confidential and was not released to us; the name of employer was not considered confidential and accordingly was released along with other information about the employer and ANSI coded information about each fatality.

All occupational fatalities noted from death certificate and medical examiner records were merged into one listing. OSHA workplace fatality inspections were then matched with cases on the merged list. A match was made when there was reasonable correspondence regarding incident date, nature of injury, and name of employer. Where a match could not be made, those listed employers in the OSHA IMIS file that had existing telephone numbers were phoned and asked to provide name of deceased. Death certificates were pulled on those additional cases.

Several additional steps were taken in order to determine how complete the IMIS data was in identifying all fatalities whose employers were under its investigative jurisdiction and in reflecting the actual investigative activity of OSHA inspectors. First, the list of employers of fatal cases that did not match with IMIS data was divided into two groups: those employers under and those not under OSHA's investigative jurisdiction. This determination was made based on name and SIC code of employers. (Names of employers were confirmed or obtained from workers compensation for the 71 cases on which claims had been filed.) The names of those covered by OSHA but not in the IMIS file were submitted to the four OSHA area offices in order to determine if inspections had taken place that had not been recorded in the IMIS file.

Results:

The final merged list identified a total of 152 fatal cases for 1984 and 1985. No single data source identified all cases. Table I shows that death certificates identified 88% of the 152 cases. They were the sole source in 29% of all cases combined.

The initial manual search through the State medical examiners records identified only 45%. We went back into the medical examiners files to search for names identified from death certificates which did not match with the initial medical examiner search. We found an additional 48 summary records in this way, making the total 116 or 75% of the 152 cases. They were the sole source in 5%.

The OSHA IMIS file identified 67 fatalities or 44% of the 152 and was the sole source in 3% of all cases. The IMIS file included the names of 10 additional employers on whom fatality inspections had been conducted but whose employees were not included in our surveillance system. Of those 10, 4 were employers where the fatalities in the end were not occupationally related, a fact which could only be determined by viewing the death certificates, and 6 employers could not be located in order to request name of the deceased.

Table II shows the completeness of case ascertainment in the IMIS file after considering the OSHA coverage of the employers. Of the 145 fatalities where the name of the employer was known, 121 or 84% occurred at covered workplaces. This means that 16% of all unintentional, non-transportation occupational fatalities in New Jersey occurred outside of the protection of OSHA. The OSHA IMIS file identified 67 or 55% of the 121 and did not identify 54, that is to say, 45%.

According to the survey of OSHA area offices, 13 of the 54 actually did receive a fatality inspection. Therefore the total number of OSHA fatality inspections, combining information from the IMIS file and OSHA area offices, was 80 or 66% of the 121 covered cases. Forty-one workplaces, or 34%, remained without an OSHA fatality inspection.

Table III is a brief description of each of the 41 fatalities with employers under OSHA's investigative jurisdiction that did not appear to have had an OSHA inspection. There are four groupings in this table. The first is of those cases where the deceased may have been self-employed, under which circumstances OSHA would not have had jurisdiction. The second is of cases where preexisting medical factors contributed significantly to death. The third is of those cases where death occurred more than five days after injury. By comparison, only 2 of the 67 fatalities where OSHA conducted an investigation died more than 5 days following injury. The last grouping is of those cases where death was immediate and external cause of death was unequivocally occupational.

Discussion:

The death certificate computer file was the best source to identify unintentional, non-transportation fatal occupational injuries in New Jersey. This is contrary to a study in Maryland (6) which found that vital records only identified two thirds of the cases whereas medical examiners reports ascertained 96% of the cases. It is also somewhat contrary to a study in Wisconsin (5) that found vital records only identified 76% of the cases when compared to workers compensation files. It is possible that some of these differences may be attributed to the fact that the other studies included motor vehicle accidents which, as the Wisconsin study demonstrated, are more likely to not be recorded as occupational in vital records data than are non-motor vehicle related fatal occupational injuries.

Although death certificate data was the best source, it was not sufficient to identify all cases. This was due primarily to obvious coding errors in 10%, and not to differences of interpretation or lack of information about the cause of death. New Jersey vital records uses a compound coding system for injuries based on the reporting system of the National Safety Council that identifies cause, location and nature of injury. This coding system requires considerable interpretation by the coding clerk. This data base would probably be more accurate if the coding system also included coding the "injury at work" box on the death certificate as "yes" or "no" as is done in most other states.

The files in the state medical examiners office were a poor source of case ascertainment primarily because its non-computerized filing system was incomplete and allowed for considerable human error in the sorting process. County medical examiners certified 90% of all the death certificates in our surveillance system, but county offices acknowledged not always sending the summary records to the state medical examiner's office.

There is no way of knowing at this point whether or how many more cases would have been picked up by medical examiners records than by vital statistics if the state medical examiners recordkeeping system was complete and accessible. It is not cost effective to utilize the state office for routine surveillance unless someone in the medical examiner's office is trained to recognize and report occupationally related reports as they come into that office or until that system is computerized.

Studies in Wisconsin, Maryland and Pennsylvania all addressed the problems of high-risk groups excluded from the protection of the Occupational Safety and Health Act. We also found this to be true in New Jersey where 16% were not covered by OSHA. Many (14 out of 24) of these were the self-employed. The self-employed and, until very recently in New Jersey, state and municipal workers, have never been under the health and safety protection of any governmental agency.

Unlike the Pennsylvania study, we found that a considerable number of fatalities under OSHA jurisdiction did not receive investigations. In Pennsylvania, 1 out of 23 fatalities, or 4%, were not inspected, compared to 41 out of 121 in New Jersey which represents 34%.

It must be emphasized that the evaluation of the IMIS file and OSHA area office fatality inspections was not designed to determine whether employers were failing to report or whether OSHA was failing to inspect cases known to it but only to determine if the investigations took place. Table III suggests some factors related to employer reporting. First, employers may not feel responsible if medical factors predisposed the individual to the fatal situation. Second, a significant time interval between injury and death may lead employers to disregard the occupational cause of death. A study in North Carolina found that only one third of "delayed deaths" were reported by the employer to OSHA in 1979 and only on fifth in 1978 (8).

There are some potential sources of error in the enumeration of the 41 uninspected but OSHA covered fatalities. It is possible that names of some employers of those 41 cases were incorrectly identified. This would have meant that the survey of fatality records in the area offices would have been inaccurate. It is also possible that the survey of area offices would have missed cases because of recordkeeping errors at the area offices. (For example, an inspection of the incident may have been carried out, but the fact that a fatality was involved may not have been noted. We know this to have been true of one case where there was a fire that was inspected and where the deceased died several weeks after the inspection took place.) If any of these were the case then the number 41 may not be accurate.

As a result of the evaluation of these data sources, the vital records program within the Department of Health is working to improve accuracy of "injury at work" coding. The state medical examiner's office is planning ways to improve completeness and timeliness of reporting. The Office of Data Analysis in the Federal OSHA office has been made aware of the difficulties and inaccuracies in the IMIS data file. We have also discussed these findings with OSHA regionally and are working with them to improve their identification of and investigative response to fatal occupational injuries in New Jersey. Finally, the New Jersey fatal occupational injury surveillance system is being expanded to include transportation and homicide related occupational fatalities.

Table I. Sources of identification of unintentional non-transportation, occupational fatalities

	1984	1985	Total
Death certificates	70	65	135 (88%)
Sole source: 29%			
Medical Examiners	59	57	116 (75%)
Initial search	39	29	68 (44%)
Repeat search	20	28	48 (31%)
Sole source: 5%			
OSHA IMIS file	33	34	67 (44%)
Sole source: 3%			
Total cases	80	72	152 (100%)

Table II: Completeness of case ascertainment in OSHA IMIS file

	1984	1985	Total	
Number of fatalities matched with IMIS file	33	34	67	
Number of fatalities not matched with IMIS file: Employer under OSHA jurisdiction	25	25	54	121 (84%)
Number of fatalities not matched with IMIS file: Employer NOT under OSHA jurisdiction	18	10	24* (16%)	
Total fatalities where name of employer was known	76	69	145 (100%)	

* Employers outside OSHA investigative jurisdiction: 14 self employed, 1 military, 7 state/municipal workers, 2 sailors on board ship.

REFERENCES

1. Public Health Service, Promoting health/preventing disease: objectives for the nation. Washington D.C.: US Department of Health and Human Services, Public Health Service, 1980.

2. U.S. Department of Labor. Occupational Injuries and Illnesses in The United States by Industry. Published annually by the Bureau of Labor Statistics., Washington D.C.

3. Accident Facts: 1985. National Safety Council, Chicago.

4. Public health Service. National Traumatic Occupational Fatalities, 1980-1984. NIOSH Division of Safety Research. Report released July 1, 1987.

5. Karlson TA, Baker SP: Fatal occupational injuries associated with motor vehicles, in Proceedings of the 22nd Confeence of the American Association for Automotive Medicine., Arlington Heights Ill. American Association for Automotive Medicine, 1978 Vol 1, p. 229-241.

6. Baker SP, Samkoff JS, Fisher RS, Van Buren CB: Fatal occupational injuries. JAMA 248: 692-697. 1982

7. Parkinson DK, Gauss WF, Perper JA, Elliott SA: Traumatic workplace deaths in Allegheny County, Pennsylvania, 1983 and 1984. JOM 28: 100-102, 1986.

8. System Sciences Inc: Comparison of employer - originated fatal accident reports to N.C. OSHA with medical examiner's reports for North Carolina, 1978-1979. Report prepared for the Directorate of Policy, Legislation and Interagency Programs, Office of Legislation and Interagency Programs, OSHA, U.S. Department of Labor, 1980.

Table III: Description of fatalities not inspected by OSHA

Description	Industry	Occupation
(Possiblv Self Employed)		
1) Scaffolding collapsed; subdural hematoma and brain laceration	painting	painter
2) Fell 30 ft, severe head injury	roofing	roofer
3) Tire inflating accident, severe cerebral contusion	?	"contractor"
4) Car rolled off ramp; asphyxia due to chest compression	auto repair	auto mechanic
(prexisting medical conditions)		
5) Fractured tibia followed by fatal pulmonary embolus	retail	salesperson
6) Drowning - fell into swimming pool following syncopal attack. Cardiomegaly due to transposition of great vessels	security	security guard
7) Prexisting seizure disorder; seizure, fell, acute subdural hematoma, subarachnoid hemorrhage	auto service station	manager
8) Seizure and fell off ladder-brain hemorrhage	manufacturing wallboard	production laborer
(greater than 5 days to death)		
9) Fell off roof; multiple injuries, pneumonia and sepsis (30 days to death)	construction	carpenter
10) Floor collapsed; brain hemorrhage (6 days to death)	construction	jackhammer operator
11) Pinned between two trucks on loading dock; multiple injuries, bronchopneumonia (13 days to death)	trucking	truckdriver

12)	Fire; 64% 3rd degree burns pneumonia and septicemia (8 days to death)	circus	laborer
13)	Fall; brain hemorrhage, pneumonia (8 days to death)	hospital	laborer
14)	Forklift accident; chest injuries hepatic failure, pneumonia (15 days to death)	?	"tow motor operator"
15)	Struck in head by a metal rod; cranio cerebral injuries, pulmonary hemorrhage (19 days to death)	sheet metal manufacturing	truckdriver
16)	Fall from ladder, brain hemorrhage, bronchopneumonia (10 days to death)	manufacturing	mechanic
17)	Fall from roof; pulmonary embolism (6 days to death)	roofing	roofer
18)	Fall from ladder, brain hemorrhage (9 days to death)	painting	painter
19)	Injury to leg; knee amputation, bronchopneumonia (25 days to death)	roofing	roofer
20)	Forklift fell on him; multiple injuries (19 days to death)	manufacturing	?

(unequivocal occupational deaths)

21)	Compressed in elevator door, asphyxia due to trach compression	Bakery	Mixer
22)	Run over by truck; multiple injuries; pneumothorax; hemoperitoneum	Trucking	Truckdriver
23)	Struck by moving truck tire; extensive injuries; hemorrhagic shock	Auto repair	Auto Mechanic
24)	Unloading steel which fell; chest trama; pulmonary contusion	Trucking	Truckdriver
25)	Unplugging pond drain; caught under water; drowning	?	Diver
26)	Clothing caught in truck, ligature strangulation; asphyxia	?	Truckdriver

27)	Fell off roof; skull fracture; brain laceration and contusion	?	Shipping Clerk
28)	Fall from scaffold; subdural hematoma; fractured skull	Construction	Millwright
29)	Forklift tipped; multiple injuries	Retail lumber	Forklift Operator
30)	Crushed by stack of pallets; neck dislocation	Electrical Supplies	Warehouseman
31)	Car fell from jack; asphyxia due to chest compression	Auto Repair	Auto Mechanic
32)	Crushed between wall and truck; traumatic crush injuries	Chemical or Trucking	Truckdriver
33)	Truck fell on him; traumatic asphyxiation	Marble Masonery	Mason
34)	Cardiac arrest; respiratory failure; spinal cord injury	Heat/Air Conditioning	Installer
35)	Tripped, fell from roof, basal skull fracture, liver rupture.	Roofing	Roofer
36)	Fall from roof; cerebral contusion, subdural and subarachnoid hemorrhage	Construction	Mason
37)	Transmission fell on him; multiple injuries to head, face, neck	Trucking	Mechanic
38)	Industrial explosion; multiple injuries	Chemical Manufacturing	Plant Worker
39)	Welding inside closed tank; anoxic pulmonary arrest (police record=OSHA notified)	Metals Manufacturing	Welder
40)	Backed into elevator shaft; extensive abdominal and chest trauma	Shipping	Clerk
41)	Fell from skyway while sandblasting; blunt force injury	Painting	Sandblaster

SIGURD LUCASSEN
GENERAL PRESIDENT

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA
101 CONSTITUTION AVE., N. W.
WASHINGTON, D. C. 20001

April 15, 1988

HAND DELIVERED

Senator Edward M. Kennedy, Chairman
Labor & Human Resources Committee
Dirksen Senate Office Bldg., Room 428
Washington, D.C. 20510

Dear Senator Kennedy:

In recent months, this International has received several complaints from employees and employee representatives concerning their exclusion from closing and settlement conferences between the Occupational Safety and Health Administration and employers.

This is an issue of critical concern to this union because of our long-standing commitment to insuring the safety and health of our members and of the unorganized employees, particularly through participation in the administrative process. We fear, however, that OSHA has charted a course which deliberately discourages this kind of worker involvement. OSHA's policy excludes employees and their representatives from the Secretary's most critical meetings with cited or about-to-be cited employers. Indeed, the enclosed statement of Stephen Perry, one of our representatives who is assigned to an organizing campaign of a dangerous shipyard operated by General Dynamics at Quonset Point, Rhode Island, demonstrates only a few of the problems workers there have faced since they alerted OSHA to massive underreporting of workplace injuries and illnesses by General Dynamics and to numerous safety and health violations.

Perry's statement and supporting documents amply illustrate how employees are being excluded from important settlement discussions between the Department of Labor and the employer, and show how, as a result, a unilateral settlement with this employer would provide a remedy which falls far short of the agency's duty to enforce the Act. Indeed, the agency's proposed remedy in the illustrative case would grant the employer amnesty from compliance with a federal law mandating availability of Material Safety Data Sheets more than two years after the statute took effect for manufacturers. We submit these documents in the hopes you will make them part of the record for next week's upcoming hearings.

Senator Edward M. Kennedy, Chairman
Labor & Human Resources Committee
April 15, 1988
Page 2

We are grateful for your continued support of worker safety and health at a time when others might consider it unfashionable.

Very truly yours,

GENERAL PRESIDENT

SL/mkd

Enclosure

STATEMENT OF STEVE PERRY

I am a United Brotherhood of Carpenters representative assigned to an organizing campaign of some 5,500 employees at the General Dynamics, Electric Boat Division, at the Quonset Point facility since June of 1985.

Shortly after I began talking with these employees I noticed an excessive number of injured workers on long-term compensation. Complaints related to occupational injury and disease and the conditions which led to them were commonplace. In December 1985, an employee, who had been overcome by toxic fumes and dusts at the facility, was fired because his body would no longer tolerate the unhealthy conditions. In the same month, William Bennett, General Manager of the facility, boasted in a press release that the facility's accident and injury rate was 50% below the national average. Indeed, as we had charged, General Dynamics most recent OSHA Log 200 shows injury and illness rates at 350% of the national average for similar shipyards and approximately 750% above the national average.

In an effort to assist these unorganized workers in evaluating their accident and injury rates, the employees and I obtained and evaluated copies of the company's OSHA Log 200. We discovered gross underreporting of injuries and illnesses and filed a complaint with OSHA complaint on January 12, 1987. OSHA's subsequent inspection of only 110 records revealed 122 willful violations and resulted in fines totaling $615,000, at the time the largest fine imposed on a Region I employer for recordkeeping violations.[1] At the present time, this case is pending before the Occupational Safety and Health Review Commission (OSHRC 87-1195).

Subsequent to the filing of a complaint concerning the company's faulty recordkeeping, we filed five other complaints citing safety and health violations throughout the Quonset Point complex. Again OSHA inspected and later cited General Dynamics for many of these safety and health hazards we complained about. [Records Building 17, Building 2 General 2003/2004 lead].

Early in the process, we contacted Kipp Hartman, OSHA's Area Director in Providence, Rhode Island, and requested that OSHA include the employees in the opening conferences, walkaround inspections and closing conferences. OSHA and the company were notified by letter that representatives had been elected and that they requested to be present during all future proceedings. For some reason, OSHA then requested, and we gave them, a letter dated October 22, 1987, copy of which is attached, explaining how the representatives had been elected. Despite the explanation several opportunities to include the employees in the proceeding passed by without their participation. That letter has never been answered by OSHA and no employee has been allowed to participate in any opening or closing conferences, walkaround inspections or settlement conferences in General Dynamics OSHRC Case Nos. 87-1255, 87-895, 87-1472. Additionally, employees were excluded from opening, closing and settlement conferences in OSHRC Case No. 87-1754 and were excluded from attending closing and settlement conferences in OSHRC Case No. 87-1195, the most important of these cases involving the recordkeeping violations discussed above.

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[1] Extrapolation of data by OSHA revealed that the lost time accident frequency rate at the facility exceeded 33 (33 of 100 workers injured each year). The national average was 4.2.

The largest of the safety and health inspections resulted in a contest by the employer and a full year delay with little abatement of the cited hazards. (See attached settlement agreement.) During settlement meetings between the Solicitor's Office and General Dynamics (at which the employees were excluded) vast concessions were made by OSHA to avoid having to try the case. Because of OSHA's interpretation of the Supreme Court's decision in Cuyahoga Railway, the employees were left only with the right to contest before the OSH Review Commission the proposed abatement period of one year for labeling and material safety data sheets.

Manufacturers were required to be in full compliance with 29 CFR 1910.1200 by May 25, 1986 and yet General Dynamics with all of its other identified safety and health problems asked for and got from OSHA a third full year to comply, in effect an amnesty for being an egregious violator of the OSH Act against whom the Solicitor would be overmatched on trial.

After the employees' contest of this one year abatement, I was provided with the attached affidavit signed by Kipp Hartman, the Area Director. Hartman rationalizes the reasonableness of the proposed one year abatement citing the 8,000 MSD sheets and the "various abatements to be made" as grounds for noncompliance with the standard. The concessions which were agreed to by the Solicitor's Office and Area Director are clearly violative of the Hazard Communication Standard. Noncompliance in this high hazard industry means more industrial disease, more exposure and virtually no protection for the workers at Quonset Point. All arguments of the company and OSHA which seek to justify this defiance of the law were previously made and disposed of during the rulemaking process. All were rejected and complete compliance was required by May 25, 1986. OSHA's responsibility under the Act has not and is not being fulfilled. Additionally, workers in unorganized workplaces are not included in OSHA safety and health procedures and OSHA continues to perform token inspections which result in fines later reduced and negotiated away by the Solicitor's Office.

The actions of Kipp Hartman with regard to the attached settlement agreement are but a symptom of a much greater problem. Workers without collective bargaining agreements have no "real" protection under PL 91-596.

Your immediate assistance is requested to insure that employers comply with, and more importantly here, that OSHA enforces, federal safety and health laws. Employees must have the right to participate in all the proceedings and settlement meetings involved in their safety and health. Otherwise, we may end up with more cozy settlements like the one discussed here. Finally, we are gravely concerned that OSHA may be making a false distinction between the abilities of a union to speak for represented employees and employees the union is seeking to represent through an organizing campaign. It appears that, in the latter case, OSHA simply ignores the procedures and safeguards it otherwise observes only when a union has elected party status after having already obtained recognition or an NLRB certification.

April 15, 1988

United Shipbuilding Crafts

P.O. BOX 805, DAVISVILLE, R.I. 02854
PHONE (401) 884-2754 — 295-0496

22 October 1987

Kipp Hartman, Area Director
USDOL, OSHA
380 Westminister Mall, Rm 243
Providence, RI 02903

re: Election of Representatives

Dear Mr. Hartman,

This letter is written in response to the request of John Miles for further information regarding the process used to elect the "representatives authorized by employees" at Electric Boat, Quonset Point, Rhode Island. Reference is made to this request in a letter from John dated 22 July 1987.

The information is provided at this time since this is the first official meeting between the "elected representatives" and your office since the meeting of 10 July 1987. However, I have reservations as to the legality of the request because facilities under agreement with Labor Unions are not required to provide similar information.

The initial election of safety representatives took place at a regular weekly meeting of the United Shipbuilding Crafts Organizing Committee on 16 June 1987. Prior notice of the meeting was mailed on 11 June 1987 and follow up phone calls were made to all members of the Committee.(Attachment #1) During the phone contacts all were notified of the nomination of three representatives by the Safety and Health sub-committee and of the election to take place at the meetings. At both meetings of the Committee (which were also open to and attended by EB employees who are not members of the Organizing Committee.) further nominations were asked of the floor. With no further nominations, Barstow Morton, Dave Pizzorno and Dan Frey were elected unanimously by all in attendance by voice vote.

By appointment of the Safety and Health Committee Chairman, Dave Pizzorno, Kevin Banach replaced Dan Frey as representative. At regular meetings and in the same manner as the elections of 16 June, Kevin Banach was officially elected as a "representative" authorized by his fellow employees on 20 October 1987.

Both the company and OSHA were notified of the first election process. Notification of Kevin Banach's election has not been provided to General Dynamics as of the date of this writing.

If I can be of any further assistance, please contact me.

Sincerely,

Stephen C. Perry

Stephen C. Perry

MAR 14 REC'D

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, United States
Department of Labor,

Complainant,

v.

GENERAL DYNAMICS CORPORATION, ELECTRIC
BOAT DIVISION, QUONSET POINT FACITLITY,

Respondent.

DOCKET NO. 87-895

REGION I

SETTLEMENT AGREEMENT

Now come the Complainant and Respondent and enter into this Settlement Agreement in the above-captioned matter.

Complainant and Respondent hereby stipulate and agree that:

(1) On May 22, 1987 respondent was cited for alleged violations of the Occupational Safety and Health Act of 1970, 29 USC 651, et seq., hereinafter referred to as the Act and was issued a Notification of Proposed Penalty in the total amount of $5850.

(2) Respondent, an employer within the meaning of section 3(5) of the Act, duly filed with a representative of the Secretary of Labor a notice of intent to contest the citations and proposed penalties. This notice was duly transmitted to the Review Commission and it is agreed that jurisdiction of this proceeding is conferred upon said Commission by section 10(c) of the Act.

(3) The Secretary of Labor has filed a Complaint herein stating with particularity the violations alleged, the penalty proposed and the issues in contest before the Commission.

(4) As a result of consideration by Complainant of new information bearing upon the factors set forth in sections 17(j) and 9(a) of the Act, the Complainant hereby moves to amend his complaint as follows:

CITATION NO.1 (SERIOUS)

ITEM 1a: Recharacterize to "other-than-serious."

b: Recharacterize to "other-than-serious."

2: No action (i.e., no change to be made).

3 a1: Amend time for abatement until 5/10/88.

a2: Complainant herewith deletes the language "a light was not provided at the center ladderway to the cab" from this item.

a3: Delete.

a4: No action (other than to include fire extinguisher with item 24 of Cit. No. 2).

b: Recharacterize to "other-than-serious."

4: No action.

5: No action.

6 a: Amend time for abatement until May 10, 1988.

b: OSHA by April 5, 1988, will assist Respondent in ascertaining appropriate means of abatement, if any, which abatement is to be accomplished on or before May 10, 1988.

c1: Delete.

c2: Delete.

d1: Amend time for abatement until May 10, 1988.

d2: Amend time for abatement until May 10, 1988.

e1: OSHA by April 5, 1988, will assist Respondent in ascertaining appropriate means of abatement, if any, which abatement is to be accomplished on or before May 10, 1988.

e2: OSHA by April 5, 1988, will assist Respondent in ascertaining appropriate means of abatement, if any, which abatement is to be accomplished on or before May 10, 1988.

f: OSHA by April 5, 1988, will assist Respondent in ascertaining appropriate means of abatement, if any, which abatement is to be accomplished on or before May 10, 1988.

g: Amend time for abatement until May 10, 1988.

7: No action.

8a: No action.

b: No action.

8c: New Item: In light of the substantial numbers of respirators, ladders, etc... in use at Respondent's facility, and in light of OSHA's finding that the large majority of such equipment was in compliance with OSHA standards, the Secretary moves to group several such instances of violation into one other-than-serious violation, as follows: Citation for Serious Violation No.1, Item 8c; Citation No. 2, Items 3, 17, 23, 26, 42, 47, 55 and 68.

9a: No action.

b: No action.

10: Recharacterized to "other-than-serious".

11: No action.

12: Delete.

13: No action.

14a: Delete.

b: Group with item 67, Citation No. 2 (recharacterized to "other-than serious").

15: Delete.
16a: No action.
b: No action.
c1: No action.
c2: No action.
17: No action.
18: No action.
19: No action.
20: No action.

CITATION NO.2 (OTHER THAN SERIOUS).

ITEM 1a: Delete.
b: Delete.
2: No action.
3: See new "other-than-serious" item, above.
4a: No action.
b: No action.
5: No action.
6: Amend to standard set forth at 29 CFR 1915.71(k)(3)
7: No action.
8: No action.
9: No action.
10: No action.
11: No action.
12: No action.
13a: No action.
b: No action.
14: Delete.
15: Delete.

16: Delete.

17: See new "other-than-serious" item, above.

18: No action.

19: Amend citing language by deleting the words "Fire Brigade Members" and substituting therefore the words "Fire personnel."

20: No action.

21a: Delete.

b: Delete.

22: Amend citing language by deleting the words "fire brigade members" and the like and substituting therefore the words "members of the industrial fire department".

23: See new "other-than-serious"item, above.

24: Consolidate to and with item 3(a)(4) of Citation for Serious Violacion No. 1.

25: No action.

26: See new "other-than-serious" item, above.

27a: No action.

27b: No action.

c: Amend time for abatement until May 10, 1988.

28: No action.

29: No action.

30: No action.

31. No action.

32: No action.

33a: The Respondent herewith certifies that it uses only one grade of metal at its workplace, that grade being Grade 80, Herc Alloy 800 chain, and that this information has been consistently made known to employees; on this basis, the

Secretary herewith deletes the language "and the grade of metal was not stated on the "identification tag" at ddd 2a of his complaint, and the language "and did not indicate the grade of metal" at ddd 2b of said complaint.

b: Delete.

34: No action.

35: No action.

36: No action.

37: No action.

38: No action.

39: No action.

40: Delete.

41: Delete abatement note.

42: See new "other-than-serious" item, above.

43: To consolidate with item 44, Citation No. 2 (both cited standards and changing language to remain intact).

44: See item 43, Citation No. 2.

45: No action.

46: No action.

47: See new "other-than-serious" item, above.

48: No action.

49: No action.

50: Delete.

51a: No action.

b: No action.

c: No action.

52: No action.

53: No action.

54: No action.

55: See new "other-than-serious" item, above, as amended to 29 C.F.R. 1915.92(b)(1).

56: No action.

57a: No action.

b: Delete.

c: No action.

58: No action.

59: Respondent agrees to splice cords which are (1) 14 AWG or larger (i.e. 12, 10, 8, etc.....) (not 16 AWG or smaller), (2) hard usage cords only, and (3) subsequently insulated equivalent to the cords' original outer insulation.

60a: No action.

b: No action.

c. No action.

d: No action.

61: Delete.

62a: No action.

b: No action.

c: No action.

d: No action.

e1: No action.

e2: No action.

e3: No action.

e4: Delete.

f: Delete.

g: No action.

h: No action.

i: To delete the language "also, a plastic container of the solvent was in the engine room and the solvent was found to be incompatible with plastics".

63: To consolidate with item 64, Citation No. 2 (both cited standards and charging language to remain intact).

64: Amend time for abatement until February 10, 1989, provided it is understood that the information referenced in the standard shall be accessible to employees on all shifts at the appropriate superintendents' offices.

65: Amend time for abatement until February 10, 1989, provided that the MSD sheets shall be available to employees in the interim at Respondent's on-site Safety Office, as is the current practice.

66: No action.

67: No action.

68: See new "other-than-serious" item, above.

69: No action.

Complainant herewith moves to amend the proposed penalties, as follows:

CITATION FOR SERIOUS VIOLATION NO. 1	ITEM 1 (originally	$270)	to	$ 50;
	ITEM 2 (originally	90	to	50;
	ITEM 3 (originally	360	to	150,
	ITEM 4 (originally	270	to	150;
	ITEM 5 (originally	270	to	150;
	ITEM 6 (originally	720	to	300;
	ITEM 7 (originally	360	to	200;
	ITEM 8 (originally	270	to	150;

CITATION FOR SERIOUS VIOLATION NO.	ITEM 9 (originally	90	to	50;
	ITEM 10 (originally	90	to	50;
	ITEM 11 (originally	180	to	100;
	ITEM 12 (originally	450	to	0;
	ITEM 13 (originally	180	to	100;
	ITEM 14 (originally	270	to	0;
	ITEM 15 (originally	360	to	0;
	ITEM 16 (originally	720	to	400;
	ITEM 17 (originally	180	to	100;
	ITEM 18 (originally	360	to	200;
	ITEM 19 (originally	180	to	100;
	ITEM 20 (originally	180	to	100

(Total amended proposed penalty (of $ 2400).

(5) In view of the aforesaid, respondent hereby withdraws its Notice of Contest and the parties agree that the citation and proposed penalty, as amended by this agreement, shall be affirmed and become the final Order of the Occupational Safety and Health Review Commission.

(6) Respondent certifies that the violations alleged have been abated or will be abated by the abatement dates as shown in the citation as amended above, and that the penalty, as amended, has been paid. Respondent agrees to continue to comply with the Act in all respects in the future.

(7) None of the foregoing agreements, statements, stipulations and actions taken by respondent shall be deemed an admission by respondent of the allegation contained within the citations, notifications of penalty and the complaint herein. The agreements, statements, stipulations, findings and actions taken herein are made for the purpose of settling this matter economically and amicably and they shall not be used for any purpose, except

for proceedings and matters arising under the OSHA Act (29 USC 651, et seq.).

(8) Respondent further certifies that the original Notice of Contest and a copy of this agreement have been posted and that all pleadings and documents in this matter have been served in accordance with Commission Rules 7 and 100.

(9) Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

GENERAL DYNAMICS CORPORATION,
ELECTRIC BOAT DIVISION,
QUONSET POINT FACILITY

BY Merle J. Smith, Jr.
Merle J. Smith, Jr.
Assistant Division Counsel

Date: March 8, 1988

George R. Salem
Solicitor of Labor

Albert H. Ross
Regional Solicitor

Paul Katz
Paul J. Katz
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United States Department of Labor
Attorneys for Complainant

Post Office Address:

U. S. Department of Labor
Office of the Solicitor
John F. Kennedy Federal Building
Government Center, Room 1803
Boston, Massachusetts 02203
(617/565-2500)
(FTS/835-2500)

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, United States
Department of Labor,

Complainant,

v.

GENERAL DYNAMICS CORPORATION, ELECTRIC
BOAT DIVISION, QUONSET POINT FACILITY

Respondent.

DOCKET NO. 87-895

REGION I

STATE OF RHODE ISLAND)
) SS
COUNTY OF WASHINGTON)

CERTIFICATE OF POSTING

I, John J. Meola being duly sworn, depose and say that: On the 9th day of March, 1988 I posted the annexed notice and copy of settlement agreement on the bulletin board for employees of General Dynamics, Electric Boat Division at Quonset Point Facility.

John J Meola

Subscribed and sworn to before me this
9 day of March 1988.

Alfred P Vallee
Notary Public

My Commission expires 6/30/91.

NOTICE

TO THE EMPLOYEES

OF

GENERAL DYNAMICS CORPORATION
BOAT DIVISION, QUONSET POINT
FACILITY

The Secretary of Labor and your employer have entered into an agreement to settle a certain proceeding now pending before the Occupational Safety and Health Review Commission. A copy of the agreement is attached hereto.

A motion by the parties for approval of the settlement is now pending. Any employee who has any objection to the agreement may, on or before the expiration of ten (10) days from the date of this posting, send the same by mail to:

Honorable David J. Knight
Occupational Safety and Health Review Commission
John W. McCormack Post Office and Courthouse Bldg.
Room 420
Boston, Massachusetts 02109

Dated 3|9, 1988

Attachment

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 1988, I served a copy of the attached Stipulated Settlement on Stephen Perry, the authorized employee representative at the following address, * . This service was accomplished by mailing the Stipulated Settlement to the representative at this last known address by postage pre-paid first-class mail.

* United Shipbuilding Crafts
P.O. Box 805
Davisville, Rhode Island
02854

NAME Paul W. Lyons

TITLE Attorney

CERTIFICATE OF SERVICE

I hereby certify that on ____________, I personally delivered a copy of the attached Stipulated Settlement to ____________ the authorized employee representative at the following address:

____
____
____
____

NAME ____________

TITLE ____________

CERTIFICATION OF NONREPRESENTATION

I hereby certify that there is no authorized employee representative for the employees affected by the action which is the subject of the attached Stipulated Settlement.

NAME ____________

TITLE ____________

APR 6 REC'D

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, United States Department of Labor, Complainant,	DOCKET NO. 87-895
and	REGION I
STEPHEN C. PERRY Employee Representative,	
GENERAL DYNAMICS CORPORATION, Electric Boat Division, Quonset Point Facility, Respondent.	

AFFIDAVIT OF KIPP HARTMANN

Comes now Kipp Hartmann who makes the following Affidavit under oath, and states that:

(1) He is the Area Director who instituted Docket No. 87-895, by way of citations issued on July 15, 1987;

(2) he has responsibility to approve any recommendations and settlements reached in the above-captioned matter;

(3) he did review and did approve the recommendations and settlement in the above-captioned matter, including, inter alia, the abatement dates regarding items 64 and 65, Citation No. 2;

(4) the Respondent had and has, the requisite MSD Sheets at instant Quonset Point Facility herein;

(5) the Respondent kept the aforesaid MSD Sheets at one location, at its Safety Office at the Quonset Point Facility;

(6) the Respondent, additionally, kept summaries of the aforesaid MSD Sheets in the eight (8) offices of its various Superintendents, which offices are located throughout the workplace;

(7) the work performed under the auspices of the various Superintendents dictated which MSD Sheet summaries were kept at each particular Superintendent's office;

(8) OSHA believed that actual MSD Sheets (and not summaries) should be located closer to the actual work areas of the employees (i.e., in the offices of the Superintendents);

(9) there are a very large number (approximately 8000) MSD Sheets in the workplace, which MSD Sheets are to be selectively apportioned to the various Superintendents' offices, as required, above;

(10) in light of the many and various abatements to be made in conjunction with the overall agreement reached in this case and, in light of the relatively low priority of this particular abatement (as the summaries were [are] already in place at the office of the various Superintendents and MSD Sheets are at the Safety Office) the abatement period until February 10, 1989 was entirely reasonable, would not prejudice the safety of employees, and would further the overall agreement of the parties and the overall protection of employees at the workplace.

I swear that the foregoing is true and correct, to the best of my knowledge, information and belief.

Kipp Hartmann
Kipp Hartmann
Area Director

Subscribed and sworn to before me this
1st day of April 1988
Lisa M. Shamirian
Notary Public
My Commission expires June 30, 1991

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

* *

SECRETARY OF LABOR, United
States Department of Labor,

Complainant,

and

STEPHEN C. PERRY

Employee Representative,

v.

GENERAL DYNAMICS CORPORATION,
Electric Boat Division,
Quonset Point Facility,

Respondent,

* *

Docket No. 87-895
Region I

EMPLOYEE'S CONTEST OF PROPOSED ABATEMENT DATES AND REQUEST FOR HEARING

The Employees hereby contest the abatement dates for Citation No.2 (Other Than Serious), Items 64 and 65, as set forth in the Settlement Agreement. The Employee's find the proposed abatement as totally unreasonable and hereby request that a hearing be scheduled as soon as possible.

The Respondent's Facility at Quonset Point was inspected during March of 1987 and found to be in violation of the Hazard Communication Standard. This highly publicized standard was entered in the Federal Register at 48 FR 53340 on November 25th 1983. It clearly required chemical manufacturers and importers to provide Material Safety Data Sheets by November 25th 1986 and employers covered by the standard to be in compliance by 25 May 1986. The standard requires employers such as the Respondent to maintain Material Safety Data Sheets and to "ensure that in all cases the required information is provided for each hazardous chemical, and is accessible during each work shift to employees when they are in their work area(s)" *29 CFR 1910.1200(g)(9)* (emphasis added)

Nearly two years have passed since compliance with the Hazard Communication Standard was required. Since the Respondent has failed to comply with this law intended to protect its workers and has apparently made little or no effort to abate this hazard, the employees find it unconscionable that another year should be allowed for abatement. The provisions set forth in the Settlement Agreement concerning the above mentioned items do not comply with the Standard in question and will not adequately protect the employees of the Respondent.

For these and other reasons, the Employees request a hearing and further petition the Administrative Law Judge for leave to engage in discovery to include both interrogatories and request for documents from the Respondent and the Complainant.

Respectfully Submitted,
Stephen C. Perry
Stephen C. Perry
Employee Representative
United Shipbuilding Crafts
P.O. Box 805
Davisville, RI 02854

CERTIFICATE OF SERVICE

I certify that the attached EMPLOYEES CONTEST OF PROPOSED ABATEMENT DATES AND REQUEST FOR HEARING in OSHRC case 87-895 was mailed this 25th day of March 1988, by overnight mail to Honorable David J. Knight, Administrative Law Judge, Occupational Safety and Health Review Commission, John W. McCormack Post Office and Courthouse, Room 420, Boston Massachusetts 02109 and by first class mail to Albert H. Ross, Regional Solicitor, US Department of Labor, J.F.K. Federal Building, Boston, Massachusetts 02203 and to Paul Lyons, Esq., Foley Hoag and Elliot, One Post Office Square, Boston Massachusetts 02109.

Stephen C. Perry

Stephen C. Perry

11 June 1987

RECEIVED
JUN 15 1987
DEPT. OF
SAFETY & HEALTH

John Miles
Regional Administrator
U.S.Department of Labor, OSHA
1 Dock Square, 4th Floor
16-18 North St.
Boston, MA 02109

Subject; Request for Review and Unannounced Inspection

Enclosures;

1. OSHA letter dated. 29 May 1987
2. My complaint dated 3 March 1987
3. New London Day article dated 29 March 1987

Dear Sir,

Enclosure 1 was sent to me in response to my formal complaint (enclosure 2) concerning safety and/or health hazards at General Dynamics Corporation, Electric Boat Division. My complaint was filed in accordance with the provisions of Section 8(f)(1) of the Occupational Safety and Health Act.

As in my original complaint I ask that my name not be given to General Dynamics and that I remain anonymous in accordance with the applicable section of the Act.

As a taxpayer and a worker "protected" by Public Law 91-596 I must strongly oppose the handling of my complaint and the conduct of the inspection of my workplace. My fellow workers and myself feel that the inspection process here was a whitewash and certainly lacked compliance with the intent of the Act. The company had prior notice of the inspection (see enclosure 3) and spent considerable time and money "tidying up" prior to the compliance officers walk through. Specific areas of my complaint were never addressed in enclosure 1. I was never contacted prior to, during or after the inspection for any clarification on the specifics of my complaint and take affront to the flat denial of violations which I listed and which still exist in my workplace. The complaints of other employees were also overlooked and it is my belief that OSHA has strongly favored the company through the entire process.

I restate to you those complaints which were never investigated during the inspection as well as other serious violations which were completely overlooked during the "walk through":

From enclosure 2;

Item #2. was denied in total disregard for the many violations of 29 CFR 1915.56 (b)(2) and (4). Exposed live wires, faulty repair where non-insulative cloth tape was used and other violations were observed on 14 welding leads in use in Building 2 last night. A poorly maintained lead led to my injury in 1986. The company failed to report this injury in the 200 log as required by law.

Item #4. was never addressed in enclosure 1 and no citations were issued for this violation of 29 CFR 1910.242(B) in Building 2. Employees continue to blow themselves and their work areas down with 90 pound compressed air, no reduction nozzles are available and no training has been given which would stop or prevent this hazardous act. There is no enforcement of this regulation by management in my workplace.

Item #5 was addressed, however, the findings are not consistent with the truth. The manifolds are built to rotate and reduce strain on the gas and oxygen lines. When the manifolds are rotated into some positions the shutoffs will not operate as required by law. Connections are taped with pipe tape, which is normally in ill repair, and gas leaks are most definitely present at this time.

Item #7 was never addressed and although the company replaced many of the airlines in their "tidy up" efforts, this condition still exists. When accidental discharge of high pressure air occurs, the hoses, fittings and assorted debris are the source of a very real hazard to myself and my fellow workers.

Item #8 was never addressed in enclosure 1. The violations of 29 CFR 1915.71(j)(1) are still present at various locations throughout Building 2 and are exposing employees to a serious hazard. The condition which I reported is above the pipe shop and was neither cited nor corrected.

The following are other serious hazards which exist today and were overlooked during the "walk through"

1. Emergency exit from Building 2 is an intregal part of a series of large nesting doors. When the large doors are opened even slightly, the emergency door will no longer operate. In an emergency, exit from the area could be restricted and I believe that this condition is not in compliance with the standards. The exit is also not marked.

2. An other than serious citation was issued (#45 b on page 32 of 60) for an employee wearing clear glasses while assisting during a welding operation. We are issued clear glasses or shaded #3 on request when and if they are available. However, no training on the requirements of 29 CFR 1910.252 have ever been given to any welder that I am aware of and although we weld both medium and heavy materials, no shaded lenses of any value greater than #3 are available to us. I for one would prefer the darker lenses as required by the standard.

3. In Bldg.2004 six welding leads were observed on 6/10/87 which were without proper insulation, poorly repaired or repaired/spliced within 10 feet of the electrode holder in violation of 29 CFR 1915.56. Some of the welding leads were so

bad that they had six repairs in the first 10 feet.

4. In Building 2004 on the VLS, MBT-3. Work is required while employees are standing on the 10 inch wide flanges of the "laydown" I beams approximately 10 feet above a hard surface in violation of 29 CFR 1915.71. No handrails or toeboards are provided in accordance with the standard. Lighting is poor which increases the potential for accident in this situation.

5. Minicrib 757 VLS, Bldg. 2004. Numerous pneumatic grinders are in use with wheels in excess of 4 inches and no guards in violation of 29 CFR 1910.243.

6. As previously described, the housekeeping has deteriorate to a condition which resembles how it was prior to OSHA's "visit" here. Welding leads, gas and oxygen lines and various other cables are laying all over the floor and staging and create tripping hazards in most areas. The isles are again filling with clutter and no longer resemble isles in some areas.

As demonstrated by the above complaint, the company's safety program is self serving and does not adequately protect those who work here. All efforts prior to the inspection were intended to limit the company's liability as a result of the inspection. Conditions have already begun to deteriorate in many areas and many of the old hazards have returned to our workplace.

I hereby request in accordance with the provisions of the Occupational Safety and Health of 1970 that OSHA conduct an immediate and unannounced inspection of Building 2 and Building 2004. I further request that OSHA contact me if the compliance officers have any doubt or question as to the location or nature of my complaints. I also request a review by you in accordance with enclosure 1 and that either myself or one of the other elected representatives of the workers at Electric Boat be allowed to participate in any opening conference, inspection and closing conference in accordance with the provisions of 29 CFR 1903.8 and the applicable provisions of the Act. The elected representatives are myself, Barstow Morton and Dave Pizzorno. Please contact us at the below listed telephone number.

Sincerely,

Dan Frey

Dan Frey
P.O.Box 805
Davisville, RI 02854
401 884-2754

Copy To: Assistant Secretary Prendergast
Joe Durst, Advisory Committee Member
Joe Adam, Advisory Committee Member

U.S. Department of Labor Occupational Safety and Health Administration

380 Westmister Mall, Room 243
Providence, RI 02903

May 29 1987

Reply to the Attention of:

Dan Frey
P.O. Box 805
Davisville, RI 02854

Dear Mr. Frey:

In response to your formal complaint concerning safety and/or health hazards at General Dynamics Corp., Electric Boat Div., the Occupational Safety and Health Administration has conducted an inspection which was completed on 3/27/87.

Reasons that conditions in your complaint were not cited are provided below:

1) Local exhaust ventilation was in use at every confined-space welding operation observed during the walkaround inspection within Bldg. No. 2. Based on previous evaluations of similiar type environments and in general open work areas, OSHA permissible exposure limits would not have been exceeded.

2) There were no defective welding cables observed.

3) All employees were found to be wearing acceptable eye/face protective equipment where needed.

4) No leaking or inoperative shutoffs were found at the oxy-propane manifold stations.

5) Our health staff is presently evaluating the company's respirator training program.

Attached for your information is a copy of the OSHA-2, Citation and Notification of Penalty, which was sent to your employer on 5/22/87 and should have been posted at the workplace for at least three days after receipt.

If you do not agree with the outcome of this inspection, then you may contact me for a clarification of the matter. You also have the right to an informal review by the OSHA Regional Administrator to discuss any disagreements with my determination that a citation is not warranted with respect to a danger or violation which you alleged to exist. He/She may be contacted at the following location:

Regional Administrator
U.S. Department of Labor
1 Dock Square, 4th Floor
16-18 North St.
Boston, MA 02109

This review may be obtained by submitting in writing your concern to the Regional Administrator and, at the same time, providing the employer with a copy of such statement by certified mail. If you had a confidential complaint and wish to preserve your confidentiality provide only the Regional Administrator with a copy of your position. The Regional Administator will remove any references in your letter to your identity, including your name, and forward a copy of this sanitized version of your appeal to the employer for you. As with the handling of your complaint, your anonymity will be preserved during the review.

Section 11(c) of Occupational Safety and Health Act of 1970 provides that "no person shall discharge or discriminate against any employee because that employee has filed a complaint." Please advise us immediately if you are punished or discriminated against for job safety and health activities. OSHA will investigate your claim of discrimination and, if warranted, will take action on your behalf to restore your job, earnings and benefits.

Thank you for your concern for a safe and healthful workplace.

Respectfully,

Kipp W. Hartmann

Kipp W. Hartmann
Area Director

Enclosure

3 March 1987

Area Director
U.S. Department of Labor, OSHA
380 Westminister Street
Providence, Rhode Island 02903

Dear Sir,

I the undersigned employee of General Dynamics at Quonset Point, Rhode Island do hereby request an unannounced inspection of Building 2, my workplace by the Occupational Safety and Health Administration.

This request is made in accordance with the provisions of Section 8 (f)(1) of The Occupational Safety and Health Act (Public Law 91-596) and the General Industry Standards 29 CFR 1910.

I hereby request that my name not be given to General Dynamics and that I remain anonymous during and after the inspection in accordance with the applicable Section of the Act.

My specific complaints include but are not limited to the following;

1) Portable grinders are used without guards in violation of 29 CFR 1910.243.

2) Inadequate ventilation causing exposure to toxic fumes and dusts associated with welding and carbon gouging.

3) Exposed live wires on poorly maintained welding leads.

4) 90 pound compressed air used to blow down machines exposing employees to flying objects and particulate contamination.

5) Leaking and inoperative emergency shutoffs at gang manifolds for oxy-propane burning.

6) Lack of training or inadequate work training in respirator usage.

7) Poor maintenance of airline fittings causes accidental discharge of high pressure air when lines are stepped on or dropped.

8) Safety cables on machine platforms are loaded with welding leads which lower the safety cables to a height of 20 inches, exposing workers to falls.

If I can be of any further assistance please contact me.

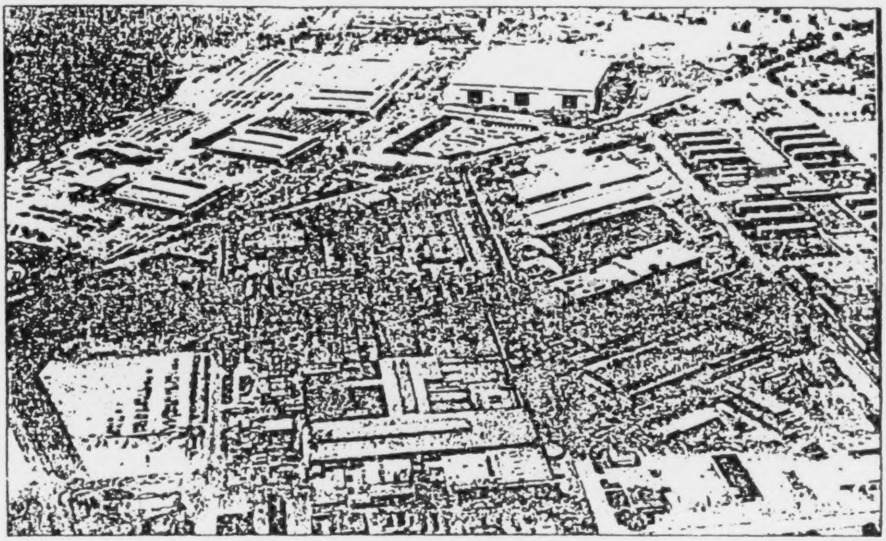
Sincerely,

Dan Frey

Dan Frey
P.O. Box 805
Davisville, RI 02854

Perspective

The Day
SUNDAY, MARCH 29, 1987



An aerial view of EB's Quonset Point facility looking south along the shore of Narragansett Bay

EB photos

Unions, EB clash at Quonset

Workers are dwarfed by giant hull sections assembled at EB's Quonset Point plant

By Maria Hileman
Day Staff Writer

Organizers are trying for the fourth time in 13 years to unionize 4,700 production workers at Electric Boat's Quonset Point hull fabrication plant in North Kingstown R.I.

Union leaders claim the effort at Quonset is the largest unionization drive now under way in the United States in terms of the size of the workforce involved. The largest private employer in Rhode Island, Quonset is also the largest non-unionized shipyard in the nation. A total of 5,800 people work at the facility.

Five organizers from United Shipbuilding Crafts have been preparing for 18 months for a union vote that will be scheduled for this summer. By the time the vote actually takes place, they say, the five leaders will be supplemented by additional union workers.

Since EB opened its facility on 200 acres leased from the Rhode Island Port Authority on the site of a former Navy air station, union organizers have tried repeatedly to gain a foothold here.

EB workers build sections of submarine hulls in an automated cylinder and frame facility at

Unions/C5

OSHA probe finds high injury rate

NORTH KINGSTOWN, R.I. — The federal government's first comprehensive inspection for safety hazards in four years began March 6 at Electric Boat's Quonset Point plant, touched off by numerous employee complaints and a fire.

John B. Miles, Jr., regional director of the Occupational Safety and Health Administration in Boston, said his agency would have launched an inspection of the entire shipbuilding plant within two or three months anyway.

"They were scheduled for a full-scale inspection this year," said Miles. "Then, as a result of the complaints and then the fire, we realized we were out there every day. That's when we decided to start the inspection early."

Miles said OSHA has since learned, from inspecting the shipyard's injury and illness rate and comparing it to the national rate of 4.2 injuries per 100 workers in manufacturing industries, that Quonset Point's reported injury rate is more than double the average.

Miles said Quonset's rate last year was about 8.5 injuries per 100 workers.

This contrasts with a statement made by Quonset Point General Manager William W. Bennett in December that injuries at Quonset are 30 percent below the national average.

Miles said the on-site inspection at Quonset Point has nearly concluded, but no results have been compiled. Though the agency by law has six months from the time of the Feb. 1 record-keeping complaint, Miles said he does not think the inspection will take that long.

The OSHA probe began the day after an air compressor about the size of a small truck exploded in the paint and blast facility, starting a fire that took firefighters 4½ hours to extinguish.

Richard Boudreau, manager of community relations at Quonset Point, said no cause has yet been established for the fire. Four workers were treated for smoke inhalation, but there were no serious injuries.

OSHA/C5

Unions, EB clash at Quonset Point

340

[illegible] C1

Quonset. Submarine hulls, sections of decks, foundations and piping are built at Quonset and brought by truck and barge to Groton, where the vessels are welded together.

The first union effort at Quonset, in 1978, was conducted by the Metal Trades Council, a coalition of 10 unions which represents 11,000 blue collar workers in Groton.

USC, which operates out of a storefront in a shopping center on Route 1 in North Kingstown, has conducted the other efforts, in 1980 and 1982. Three unions, the International Brotherhood of Boilermakers, the United Brotherhood of Carpenters and the United Association (pipefitters), comprise the USC.

The 1982 union effort, offset by a countereffort by the company to sway workers from the union, was a dismal failure. Workers voted by a 3-1 margin against the union. The closest the union ever came was in 1980, when the effort lost by 200 votes.

"It's a tremendous undertaking, trying to unionize 5,000 production workers," said Maurice Orio, assistant director of USC. "Since the very first union campaign in 1978, unions have had a presence here. After each election, we've scaled down the staff, but we've always been here."

Company officials believe there are clear reasons why so many union efforts have failed at Quonset. "It comes down to individuality," said Richard Boudreau, manager of community relations at the plant. "People feel they can act on their own behalf rather than have someone else speak for them. If they have a problem, they don't [illegible] it."

Boudreau said the company is already involved in organizing a "union avoidance" effort, similar to the one in 1982, in which first supervisors and then workers are given information about what the company believes they stand to lose by unionizing.

The issue that the union has seized on as a focal point of this campaign at Quonset is safety. The issue has received a significant amount of publicity, particularly as the result of an investigative report aired Feb. 26 by WJAR-TV 10 in Providence.

The WJAR investigation concluded that EB has been underreporting to the federal Occupational Health and Safety Administration incidences of serious injuries at the shipyard.

The union also claims there are significant differences between wage scales at Groton and Quonset, primarily because wage increases negotiated by the MTC each year are not given to workers at Quonset until three months later.

Richard Keenan, manager of human resources, confirmed that is the pattern at Quonset, and said it is consistent with other General Dynamics operations throughout the country to have different schedules for wages and benefits.

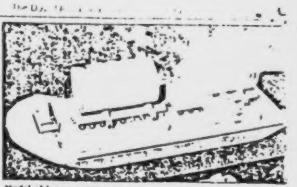
Orio said workers at Quonset are merit rated in three categories, so that not every worker receives the full percentage increase negotiated by the Groton union. In general, however, Orio said the wage scales for specific crafts at Quonset are similar to those at Groton.

A major reason why union efforts have failed at Quonset, Orio said, is a high attrition rate, which he claimed is in excess of 30 percent annually. "There are new people all the time to educate here," he said. "They've hired half the entire state of Rhode Island and fired half of them. The attitude of management is not one of dignity and respect. It's more like, 'If you don't like it, there's the door.'"

EB's Boudreau said Orio's figure for attrition is not accurate. He said the annual attrition rate at Quonset has averaged slightly over 14 percent per year, including both hourly and salaried workers.

Orio said organizers are confident this will be the year that Quonset Point is unionized. "The effort is coming together quickly now," he said. "We've done it very methodically by department. People here are starting to realize they have no protection whatsoever, and are subject to the whims of management."

Boudreau said the company is equally confident the union will fail. "In 13 years we've gone from eight employees to almost 6,000 here," Boudreau said. "We've done that by working together as a team. Three times unions have tried to break up the team. We really don't need a group of outsiders working at this place."



Model of barge used to transport sections of submarine hulls [illegible] Quonset Point to Groton

OSHA investigation

[illegible] C1

Prior to the fire, OSHA had received three complaints since Jan. 1 from shipyard workers about safety violations. EB officials said 13 safety complaints were filed over the past 10 years at Quonset by workers, including two between 1983 and 1986 and three so far in 1987.

United Shipbuilding Crafts, which for 18 months has tried to unionize the 4,700 production workers at Quonset, describes the safety issue as a major source of employee discontent.

The union effort, expected to culminate in an election this summer, is the fourth in nine years at the shipyard.

The union's position is that even the 9.5 percent rate of injuries reported by management for Quonset Point is low. Steve Perry, safety and health representative for the USC, said the union has identified 40 people with pending workers compensation cases that were not reported in 1986.

Miles said that, by and large, workers compensation cases do fall into the category of reportable incidents.

Union organizers also cite the result of an investigative report aired Feb. 26 by WJAR-TV 10 in Providence. Entitled "EB: Failure to Report," the investigation concluded that EB is not reporting all its job related injuries to OSHA, an allegation OSHA is checking out.

WJAR identified at least 65 EB employees who sustained serious injuries in 1986, yet 44 of them were not listed on the OSHA reporting logs.

EB spokesman Boudreau said the company believes the recent spate of employee complaints has been instigated by the union effort. "We find it a curious coincidence that all of these things are happening at the same time," Boudreau said.

Richard Keenan, manager of human resources at Quonset, stressed that safety is a big consideration at the shipyard and said fines will depend on whether OSHA concludes that any incidences of underreporting were willful violations.

Miles of OSHA said incidents that the agency requires to be reported include anything that exceeds "normal first aid." "If someone breaks an arm and is put on desk work, that is still an injury, and it has to be reported," Miles said. "Anything that results in worker's comp is also a good indicator. If they lose work or are restricted in any way from their normal job, it is reportable."

Union officials also claim EB seems to have prior notification from OSHA about impending inspections and sends work crews scurrying to clean areas ahead of the federal investigators.

"They stopped all production and cleaned up for about a week before OSHA went through," alleged Perry. "They removed welding leads with illegal taped joints, took out air lines and tripping hazards, and called people in on overtime to clean up."

Boudreau said EB was informed March 5, the day of the fire in the paint and blast facility, of the agency's plans to inspect the plant. "If you have somebody who's going to visit you, you're going to tidy up," he said. "We do this for visitors of any kind, the Navy or vendors. I would disagree that we were scrambling around like mice. They were normal preparations."

Boudreau said only about a dozen workers were called in on overtime on March 7 to clean up before the OSHA inspection, less than half of one percent of the workforce. He said prior to recent belt-tightening moves at both Groton and Quonset, an average of 8 percent of the workforce work overtime on Saturdays.

Miles said it is illegal to give a company prior notification of OSHA inspections. "But as you walk around, they know where you're going," he said. "The main thing we want is to get an abatement of the hazards. Sometimes we give notice if we need to see records."

Company officials also implied that EB employees were engaging in acts of "vandalism" while OSHA inspectors were at the plant. Boudreau said the incidents, which he declined to describe, are under investigation by EB and the North Kingstown Fire Department.

William Roehl, director of USC, sent a strongly worded statement to General Dynamics chairman Stanley C. Pace this week objecting to company comments on the issue.

"If there is any statement emanating from your management that implies that USC has in any manner encouraged, engaged in or suggested such un-American activities, we intend to take immediate legal action to defend ourselves against such ludicrous defamation," Roehl said.

— Maria Hileman

Coping series to start

GROTON — The Groton Public Library, Route 117, will hold its last program in the "Coping with Life's Passages" series from 7-9 p.m. Wednesday.

"How to Handle Stress at Work" will be presented by Dr. David F. McMahon, chief of the psychiatry department at William W. Backus Hospital in Norwich will be the guest speaker.

McMahon, a graduate of Princeton University and the Stanford School of Medicine, is the immediate past president of the Hartford Psychiatric Society, serves on the executive council of the Connecticut Psychiatric Society and is the chairman of the Connecticut Hospital Association Psychiatric Administrator's Conference.

There will be a question and answer period. The program is free and open to the public.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
ROOM 420
BOSTON, MASSACHUSETTS 02109-4501
(617) 223-9746

February 5, 1988

IN REFERENCE TO SECRETARY OF LABOR v.

GENERAL DYNAMICS CORPORATION
ELECTRIC BOAT DIVISION, QUONSET POINT FACILITY

OSHRC
DOCKET NO. 87-1195

NOTICE IS HEREBY GIVEN TO THOSE LISTED BELOW:

FOR THE SECRETARY OF LABOR

Albert H. Ross, Regional Solicitor
U. S. Department of Labor
JFK Federal Bldg. - Room 1803
Boston, Massachusetts 02203
Attn: David L. Baskin, Esq.

OF: Order to Show Cause Why Proceeding Should Not Be Dismissed.

TO WIT: See attached.

FOR THE EMPLOYER

Paul V. Lyons, Esq.
Foley, Hoag & Eliot
One Post Office Square
Boston, Massachusetts 02109

FOR THE EMPLOYEES

Stephen C. Perry, Representative
United Shipbuilding Crafts
P. O. Box 805
Davisville, Rhode Island 02854

cc:

Chief Judge Tenney

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

- - - - - - - - - - - - - - - - - - - -

SECRETARY OF LABOR, :

Complainant :

v. : OSHRC Docket No. 87-1195

GENERAL DYNAMICS CORPORATION
ELECTRIC BOAT DIVISION, QUONSET :
POINT FACILITY

Order to Show Cause Why
Proceeding Should Not
Be Dismissed

Respondent :

- - - - - - - - - - - - - - - - - - - -

On January 20, 1988, an order was entered suspending all further proceedings because -- as of January 13 -- complainant was unsure of the direction any further action might take, i.e., whether criminal sanctions against respondent would be pursued. With that threat hanging over respondent and those associated with it, no further, fruitful course is open.

Now, therefor, it is ordered that -- by February 22, 1988 -- complainant must show cause why this proceeding [at a dead standstill because of complainant's inaction] should not be dismissed without prejudice to complainant reinstituting it whenever ready.

David J Knight
DAVID J. KNIGHT
Judge, OSHRC

Dated: February 5, 1988
Boston, Massachusetts

EB workers to testify at OSHA hearings

By William Hanrahan
Day Staff Writer

Electric Boat workers will square off Tuesday against company officials in Boston when the Occupational Safety and Health Review Commission conducts a hearing on alleged safety violations at EB's hull fabrication plant in Quonset Point, R.I.

At issue will be a $5,850 fine and 89 safety violations issued against EB last March following a wall-to-wall inspection of the plant conducted by the Occupational Safety and Health Administration.

"We hope to get the things fixed," said Stephen C. Perry, a representative with United Shipbuilding Crafts, a union trying to organize an estimated 4,100 blue-collar workers at the shipyard.

Perry said he and about 10 other workers plan to testify in Boston before David J. Knight, an administrative law judge, who works for the review commission.

The review commission is a separate government agency that settles disputed OSHA investigations.

"A lot of the violations have not been fixed yet," Perry said. "General Dynamics (EB's parent company) has been stalling by every legal means available to them."

While the fine levied against EB is relatively small, a company spokesman said EB is fighting the issue on principle.

"'We are contesting some of the alleged violations because we simply do not agree with them," said Chris Schildz, a GD spokesman in St. Louis. "The dollar amount is not the principle issue."

The original 89 violations — 20 of them called serious — included defects in powered industrial forklifts, such as hydraulic leaks, malfunctioning windshield wipers, and broken parking brakes, according to Kipp W. Hartman, OSHA's area director in Providence.

Perry said the plant was also cited for broken handrails, which have exposed workers to potential falls of up to 40 feet, steel-cutting equipment lacking

OSHA

From B1

proper safety guards, and improperly documented safety data sheets, which have not informed workers how to handle dangerous chemicals, Perry said.

"They've fixed some things, but many of them they haven't fixed," Perry said. "Many of these things were serious hazards."

Perry claims EB received early notice about OSHA's March inspection and then conducted an extensive cleanup before the inspection began. He said if EB officials hadn't known investigators were coming, the violations would have been "tenfold, at least."

"They stopped building submarines and spent thousands of man-hours cleaning the facility in preparation for the inspection," Perry said.

In a related matter, an official from the Labor Department said Thursday a decision still is pending on whether the government will file criminal charges against EB in connection with a $615,000 fine levied last July for alleged record-keeping violations at Quonset Point.

Jerry G. Thorn, the Labor Department's deputy solicitor for national operations in Washington, said it could take until summer before a decision is made. EB is charged with 121 record-keeping violations. The company reportedly failed to report or misreported accidents that led to injuries including sprains, burns and fractures.

EB contested all the charges, and a hearing similar to the one scheduled Tuesday is expected.

EB officials have said they feel there are no grounds for a criminal indictment, but Perry said the case is another example of EB shirking its responsibility to its workers.

The hearing Tuesday will begin at 10 a.m. in the J.W. McCormack Post Office and Court House in Boston.

The Day

MONDAY, FEBRUARY 8, 1988

UNITED PAPERWORKERS INTERNATIONAL UNION

WAYNE E. GLENN
President

JOHN M. DEFEE
Secretary—Treasurer

December 8, 1987

John Pendergrass, Assistant Secretary
U.S.Department of Labor-OSHA
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Executive Secretary
Occupational Safety and Health Review Commission
1825 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Pendergrass:

We are writing to voice our vigorous objection to the way in which the settlement of OSHA citations against the Scott Paper Company have been handled by the Occupational Safety and Health Administration. The settlement in question involves Docket #87-1682 and includes not only the citation against Scott Paper on recordkeeping violations, but also the citation involving safety violations discovered on a wall-to-wall inspection of the Winslow, Maine facility.

Specifically, we object to:

(1) providing Scott corporate representatives, during the early stages of discussion of settlement of recordkeeping citations, with copies of the safety citations **before these were duly issued** and **without affording the same privilege to UPIU Local 911 which had party status in the case.**

(2) failing to properly notify UPIU Local 911 regarding the time and place of discussions to settle the recordkeeping citations, which took place in Washington, D.C. on November 30.

(3) **denying** UPIU Local 911 **the right to review the written settlement agreement** before requiring approval or disapproval. Local 911 president Lee Pelletier was phoned while at work on November 30 by an OSHA Solicitor and was required to make a decision about accepting or rejecting the settlement immediately. In addition to being pressured to make that decision without benefit of reviewing the written settlement agreement, Pelletier was not even afforded the benefit of private counsel with the solicitor since the call was made on a speaker phone

INTERNATIONAL HEADQUARTERS P O BOX 1475 • NASHVILLE, TENNESSEE 37202 • TELEPHONE (615) 834-8590

with OSHA staff and Scott corporate representatives listening. We believe had our Local been given the 10 day review period provided for by the Review Commission, we could have made specific recommendations to improve the record-keeping procedures of the company.

(4) agreeing to settle the monetary fines associated with **both** the recordkeeping and safety citations **before the safety citation was issued** and

(5) issuing the safety citation, which contains willful, repeated and serious citations, **without penalties attached**, therefore failing to publicly stand behind the gravity of these serious citations and removing leverage OSHA had to negotiate on behalf of Scott workers over the terms of compliance with the safety citations specific to the Winslow site.

(6) providing for a special 45 day informal procedure between Scott and OSHA to negotiate **any** objections to the safety citations without the need to file a formal contest thus **circumventing the procedures** established to guarantee the rights of participation to all parties in the case.

Because no administrative law judge was ever assigned to (Docket 87-1682) this case, we are asking that this letter constitute a formal objection to the process of **pre-citation** settlement which we believe flaunts the rights of employees guaranteed by party status under the rules of procedure of the OSHA Review Commission. The process followed by OSHA in this matter sets an unacceptable precedent and we request written assurance that:

(a) no citations will be the subject of settlement negotiations until they are issued and until time has been provided for all concerned parties to elect full status in the case;

(b) no settlement negotiations will be initiated until a notice of contest has been duly filed;

(c) no settlement negotiations will take place unless all parties are notified of the time, place, and substance of the negotiations;

(d) no settlement will be approved until all parties have 10 days to review and consider the terms of the settlement as provided for in Review Commission rules of procedure.

We anticipate a prompt reply to these issues, which we consider to be of utmost significance to preserving the due process rights of employees in OSHA enforcement proceedings.

Sincerely,

Stevens Trawick

Stevens Trawick, Director
UPIU Occupational Health and Safety Department

Copies of this letter have been sent today by first class mail to:

Jerry Solomon, Esq.
US DOL - Office of Solicitor
John F. Kennedy Federal Bldg.
Government Center, Room 1803
Boston, MA 02203

Nancy Kent Sowa, Esq.
Scott Paper Company
Scott Plaza 2, Law Division
Philadelphia, PA 19113

cc: Wayne E. Glenn, President UPIU
James Dinardo, Vice-President, UPIU Region I
Gordon Roderick, International Representative
Lee Pelletier, President UPIU Local 911
Gerald Michaud, President UPIU Local 431

John Miles, Director, OSHA Region I
William Masters, OSHA Area Director, Augusta Maine
Ed Eagan, Labor Liaison, OSHA Region I

Senator George Mitchell
Senator William Cohen
Representative Joseph Brennan
Representative Olympia Snow
Senator Metzenbaum
Senator Kennedy

Margaret Seminario, Associate Director AFL-CIO Dept. of Occupational Safety, Health and Social Security

/cs
opeiu,105/afl-cio

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

December 21, 1987

Mr. Stevens Trawick
Director
Occupational Health and Safety Department
United Paperworkers International Union
P. O. Box 1475
Nashville, Tennessee 37202

Dear Mr. Trawick:

This is in response to your letter of December 8, 1987, expressing objections to the process by which citations against the Scott Paper Company were settled.

Before addressing your procedural concerns, I would like to take the opportunity to discuss generally OSHA's handling of citations for injury and illness recordkeeping violations. For nearly two years, OSHA has been placing particular emphasis on the critical importance of accurate recordkeeping in an employer's overall program to assure a safe and healthful workplace. OSHA has not been reluctant to take the strongest possible enforcement action in a limited number of cases in which employers have demonstrated an unacceptable disregard for OSHA's recordkeeping requirements. In these cases, OSHA has had remarkable success at achieving correction of these unacceptable practices through the negotiation of agreements which provide for corporate-wide abatement of the violations and for corporate commitment to maintain accurate records in the future.

Because of the corporate-wide nature of these settlement agreements, a number of cases have been settled with the involvement of corporate officials and counsel, and agency officials and counsel, at the headquarters and national office levels, respectively. We have been willing to negotiate at these levels where circumstances warrant, in order to achieve our goal of corporate-wide abatement, resulting in enhanced protections for many thousands of workers beyond those employed or represented at the individual plant at which the citations were issed. We have also been willing to consider other new approaches to resolving these cases where the overall agreements, including the penalty amounts collected, represented the best possible result, consistent with the requirements of the Occupational Safety and Health Act.

In the settlement of the Scott Paper cases, we believe that the agreement with Scott represents a major achievement in our goal of effective enforcement of the OSH Act. First of all, it achieves a final, successful corporate-wide resolution of one of our major recordkeeping cases, which has been an important link in our program on recordkeeping compliance. Secondly, it lays an effective foundation for the efficient disposition of the numerous safety violations, and particularly for their quick abatement without the necessity of lengthy, complex litigation. Local 911 is, of course, entitled to participate in the abatement aspects of the citation and nothing in the settlement agreement adversely affects those rights. Finally, the $475,0000 penalty payment by Scott represents one of the largest penalties ever paid under the Act and reflects the importance we have placed on the penalty enforcement mechanism.

Naturally, the timing, terms, and negotiation process for each case depends on its unique circumstances. It is OSHA's policy to settle matters arising under the Act amicably, if possible, and short of the formal contest procedures provided as a last resort. More than 95% of all OSHA cases are settled without the filing of a notice of contest. We think this is particularly desirable, if it is possible, in our largest cases, where lengthy litigation only delays the speedy abatement of the violations found. Viewed in that light, we think the Scott Paper settlement represents a particularly effective enforcement of the Act.

With respect to the specific issues you have raised concerning the process by which the settlement agreement was reached and the procedures utilized to elicit the input of the employee representative, we want to assure you that we did not in any way seek to avoid providing either Local 911 or the International Union the opportunity to participate in the settlement process. To the contrary, the president of Local 911 was notified in advance that the November 30 meeting would occur. Attempts to contact your office were unsuccessful due to Thanksgiving week. However, as you are aware, Mr. Pelletier was consulted during the course of the negotiations. Furthermore, the employees' views will certainly be taken into account during the remaining efforts to finalize these matters.

In those situations were the early and prompt settlement of large cases such as Scott Paper has been in the best interests of worker safety and health and OSHA's enforcement effort, we recognize that it has not always been possible for employee representatives to participate in negotiations to the full extent they would desire. However, in an effort to continue our practice of consulting as much as possible with employee representatives in such circumstances, we will review our existing procedures to assure that an adequate opportunity for such consultation is provided, where practicable. In our review we will, of course, be careful to preserve employees' statutory rights to participate with regard to the reasonableness of abatement dates, as was done in the Scott Paper settlement.

Thank you for your constructive comment on this important matter.

Sincerely,

John A. Pendergrass

John A Pendergrass
Assistant Secretary

UNITED PAPERWORKERS INTERNATIONAL UNION

WAYNE E. GLENN
President

JOHN M. DEFEE
Secretary—Treasurer

January 8, 1988

John A. Pendergrass
Assistant Secretary for Occupational Health and Safety
U.S. Department of Labor
Washington, DC 20210

Dear Mr. Pendergrass:

Thank you for your reply to my letter of December 8. There are a few points you raised to which I would like to respond.

First, let me emphasize that the United Paperworkers International Union sincerely appreciates OSHA's efforts to deal with injury and illness recordkeeping violations. We recognize that this initiative poses unique enforcement problems. However, we believe that solutions to these problems can be found which do not abridge employee rights of participation in the enforcement process.

We acknowledge that circumstances interfered with communication to our International Health and Safety Office. It remains our information that the President of Local 911 was, however, not properly notified that the settlement meeting would occur on November 30. More importantly, the haste of OSHA to conclude the settlement denied informed employee input into the settlement which we believe would have improved and clarified the terms of compliance. For example, we are aware that your agency has been devoting a great deal of time and expense to articulating procedures for systematically recording and investigating recordable incidents, and believe Scott would have benefitted from more specific guidance. The settlement could also have spoken to the need for employee review of records and procedures—a factor which has proven important for assuring accuracy.

Rather than lay an "effective foundation for the efficient disposition" of the numerous safety violations, it appears that the pre-citation settlement proceeding signaled Scott that it could get its way on the safety issues too. We say this in light of Scott's recent decision to contest all the safety violations. We are encouraged, however, by your assurance that "employees' views will by taken into account during remaining efforts to finalize these matters", and look forward to active involvement in the process of dealing with the contestment of the safety violations. We feel an important factor for our informed participation is access to the original amounts of the penalties assigned to the safety violations. This information will allow us to understand the relative seriousness with which the inspectors regarded the violations and to guage the amount of investment we can reasonable expect Scott to make in abatement measures.

corrected in original

Thank you again for your willingness to dialog with us on this issue.

Sincerely,

Steve Trawick

Steve Trawick, Director
Occupational Health and Safety Department
United Paperworkers International Union

cc: Wayne E. Glenn, President UPIU
James Dinardo, Vice President, UPIU Region I
Royal Roderick, International Representative
Lee Pelletier, President UPIU Local 911
Gerald Michaud, President UPIU Local 431
John Miles, Director OSHA Region I
William Masters, OSHA Area Director
Ed Eagan, Labor Liaison
Senator George Mitchell
Senator William Cohen
Representative Joseph Brennan
Representative Olympia Snowe
Senator Howard Metzenbaum
Senator Ted Kennedy
Margaret Seminario, AFL-CIO
Charles O'Leary, Maine AFL-CIO

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MEMORANDUM OF AGREEMENT

1. This agreement is entered into by the United States Department of Labor, Occupational Safety and Health Administration ("OSHA") and Scott Paper Company ("Scott") in order to resolve differences regarding compliance with recordkeeping and safety requirements of the Occupational Safety and Health Act of 1970 (the "Act"), and to avoid litigation and expense to both parties. Scott does not admit any wrongdoing or violation of the Occupational Safety and Health Act, or any regulation or standard issued pursuant thereto.

2. OSHA has investigated Scott's safety and recordkeeping under the Act at its plant in Winslow, Maine. This investigation has resulted in the issuance of citations for violations of the recordkeeping and safety provisions of the Act and its implementing regulations.

3. The citation for recordkeeping violations has been contested by Scott and is presently pending before the Occupational Safety and Health Review Commission as Docket No. 87-1682. That citation is being settled by a separate stipulation and settlement agreement to be filed in that case. The payment for that citation shall be paid in accordance with paragraph 5 of this agreement.

4. Three citations for safety violations are being issued on December 1, 1987. Scott expressly reserves its right to contest the individual alleged safety citations and abatement dates, however, the parties agree to use their best efforts to amicably resolve any differences regarding these citations. If Scott elects to contest the citations and/or abatement dates, the parties agree that the following procedures will be observed:

a. For a period of 30 working days from the date of the Notice of Contest, the parties will attempt to reach a resolution of disputed items. If a complete resolution is not achieved in that time, the Solicitor of Labor and the General Counsel of Scott will attempt to reach a resolution on the remaining items within an additional fifteen working days. If the parties are still unable to reach final resolution, then the Secretary may issue a complaint in accordance with the amended Rules of Procedure of the Occupational Safety and Health Review Commission.

5. Scott agrees to pay a total of $475,000 for both the recordkeeping and safety citations. Payment shall be made to the U.S. Department of Labor no later than December 15, 1987.

6. The agreements, statements, and actions taken herein shall not be used in any litigation and shall not be admitted in evidence in any proceedings, other than a matter originating under the Occupational Safety and Health Act.

7. This agreement, together with the appropriate citations, shall be posted in accordance with the provisions of 29 C.F.R. 1903.16.

Norman M. Heisman
NORMAN M. HEISMAN
General Counsel
Scott Paper Company

Date: 12/1/87

George R. Salem
GEORGE R. SALEM
Solicitor of Labor
U.S. Department of Labor

Date: 12/1/87

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

WILLIAM E. BROCK,
SECRETARY OF LABOR,

Complainant,

v.

SCOTT PAPER COMPANY,

Respondent,

UNITED PAPER WORKERS
INTERNATIONAL UNION,

Authorized
Employee
Representative

OSHRC DOCKET
NO. 87-1682

STIPULATION AND SETTLEMENT AGREEMENT

I

Complainant and Respondent have reached a full and complete settlement of the above-captioned matter presently pending before the Occupational Safety and Health Review Commission. The parties hereby agree as follows:

II

(a) The Occupational Safety and Health Review Commission (hereinafter the "Commission") has jurisdiction of this matter pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590: 219 U.S.C. §651 *et seq.*) (hereinafter the "Act").

(b) Respondent, Scott Paper Company, is a corporation with its principal place of business located in Tinicum Township, Delaware County, Pennsylvania. It has been at all times material to this proceeding engaged in the business of manufacturing and has operated a manufacturing facility located in Winslow, Maine. During the course of its business, its employees perform various tasks in the nature of manufacturing. During the course of its business, Respondent, at its Winslow, Maine plant, uses material and equipment which it receives from places located outside Maine. Respondent, as a result of the aforesaid activities, is an employer engaged in a business affecting commerce as defined by Section 3(3) and 3(5) of the Act, and has employees as defined by Section 3(6) of the Act, and is subject to the requirements of the Act.

(c) As a result of an inspection conducted on March 25, 1987 through June 8, 1987, at Respondent's workplace in Winslow, Maine, 199 citations were issued to Respondent on September 25, 1987, pursuant to Sections 8 and 9 of the Act. The citations allege violations of the recordkeeping requirements set forth in 29 C.F.R. §1904.2(a). Notifications of proposed penalties were also issued to Respondent on September 25, 1987.

(d) Respondent disagreed with the citations and filed a timely notice of contest to the citations and penalties with the Secretary of Labor. The contest was duly transmitted to the Commission.

III

Respondent agrees to the following provisions:

(a) Respondent agrees to withdraw its notice of contest to the citations described above, and to pay the U.S. Department of Labor $475,000 in full financial settlement of both the recordkeeping and safety citations. The parties agree that this payment satisfies the proposed fine in this matter and the other matters covered in the attached memorandum of agreement.

(b) Respondent agrees that it will, by February 29, 1988, at the Winslow, Maine plant, properly record the injuries and illness incidents as identified in the subject citations. Furthermore, it will, going back to January 1, 1986, review its recordkeeping practices at all other wholly-owned manufacturing facilities covered by the Act as set forth in Section 4(a) of the Act in order to determine compliance with the Act, the regulations at 29 C.F.R. Part 1904, the OSHA 200 Log and the revised BLS Guidelines for Occupational Injuries and Illnesses, effective April, 1986, except to the extent they may be deemed inapplicable by intervening legislation or by binding judicial precedent. Respondent agrees that it will accomplish this process by June 30, 1988 for its two other manufacturing facilities in the state of Maine and by December 31, 1988 nationwide.

(c) Respondent agrees to maintain its injury and illness records at the locations identified in Section III(b) hereof in accordance with the Act, the recordkeeping regulations at 29 C.F.R. Part 1904, the OSHA 200 Log and the revised BLS Guidelines for Occupational Injuries and Illnesses effective April, 1986, (and as they may from time to time be revised), except to the extent they may be deemed inapplicable by intervening legislation or by binding judicial precedent.

(d) Respondent agrees to notify the Secretary in writing by February 29, 1988, of the actions to be taken to implement Paragraphs III (b) and (c) hereof. Respondent further agrees to provide the Secretary with written confirmation no later than January 15, 1989, indicating that these actions have been completed.

IV

Respondent does not admit any wrongdoing or violation of the Occupational Safety and Health Act or any regulation or standard issued pursuant thereto. It is further agreed that the terms of this Stipulation and Settlement Agreement and any classifications and penalties as used herein will not constitute an admission of any kind by either party in any proceeding before any court, agency, commission or any other body in any action arising from, growing out of or related to the matter set forth in the citations, except for further proceedings under the Act. This agreement is made in order to avoid further litigation and expense to both the government and Respondent and to resolve differences regarding compliance with the Act.

V

Each party agrees to bear all of its own attorneys fees, costs, and expenses arising out of and incidental to the instant matter.

WHEREFORE, the parties agree that under the above-noted conditions this matter docketed before the Commission as Docket No. 87-1682 is hereby settled.

FOR COMPLAINANT:	FOR RESPONDENT:
GEORGE R. SALEM Solicitor of Labor	
ALBERT H. ROSS Regional Solicitor	
Jerrold Solomon saw JERROLD SOLOMON Trial Attorney	Nancy Kent Sowa NANCY KENT SOWA Counsel
U.S. Department of Labor Office of the Solicitor 200 Constitution Avenue, N.W. Washington, D.C. 20037	Scott Paper Company Scott Plaza II Philadelphia, PA 19113
DATE: 12-1-87	DATE: 12/1/87

FOR UNITED PAPERWORKERS
INTERNATIONAL UNION, Local 811:

LEE PELLETIER
President

DATE: ______________

CRS REPORT FOR CONGRESS

OSHA SAFETY INSPECTION TARGETING: CAUSES AND EFFECTS

When the Occupational Safety and Health Act was passed in 1970, it provided coverage for about 80 percent of all workers. Beginning in the mid-1970s, all three branches of Government -- Legislative, Executive, and Judicial -- acted independently or in combination to exempt various groups of workers from regularly scheduled Occupational Safety and Health Administration (OSHA) safety inspections. As a result, only 11 percent of all workers remain under OSHA's generally scheduled safety surveillance. This report first traces the history of these exemptions. Then it compares injury and fatality rates in exempt and nonexempt industry divisions in an attempt to evaluate the effect of OSHA safety inspection targeting on reducing fatalities and lost workday injuries.

by
Mary Jane Bolle
Specialist in Labor Economics
Economics Division

March 9, 1988

Revised March 22, 1988

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OSHA SAFETY INSPECTION TARGETING: CAUSES AND EFFECTS

The Occupational Safety and Health Act of 1970 (OSH Act) was designed to protect nearly 80 percent of all U.S. Workers. Only three groups were officially excluded: the self-employed; those employed by State and local governments; and those covered under other worker safety and health laws. This last group includes miners, and railroad, airline, and nuclear facilities workers.[1]

In the nearly two decades since the OSH Act's passage, however, congressional amendments and administrative decisions have limited the percentage of U.S. workers included in "general schedule" (regularly scheduled) safety inspections conducted under the Occupational Safety and Health Administration (OSHA) to 11 percent of all workers.[2] By increments, Congress and OSHA, with some help from the Supreme Court, have done this by ultimately excluding from OSHA's target list essentially all workers except those in construction, oil and gas extraction, maritime operations, and high hazard manufacturing.

Of the 12.5 million workers *remaining on OSHA's target list*, about 21 percent are visited by an OSHA inspector in any given year; and 39 percent more are employed in these establishments but not directly included in the inspection. However, only 3 percent of *all* workers technically covered by the OSH Act are in operations inspected in any single year; and another 6 percent are employed in these establishments but not directly included in the inspection. This is in sharp contrast to miners, covered under separate legislation, the Mine Safety and Health Act of 1977.[3] Miners, by law, have their workplaces inspected four times each year if they work in underground mines, and twice a year if they work in surface mines.

This paper traces the evolution of OSHA's safety inspection targeting. Then it compares changes in serious injury and fatality rates over time among workers in safety inspection-targeted and nontargeted industries to examine the effectiveness of OSHA targeting in reducing injuries and fatalities.[4]

---

[1] P.L. 91-596, Sec. 4.

[2] This paper focuses on OSHA safety inspections. Currently, more than 80 percent of OSHA's inspections are safety inspections, and the preponderance of OSHA's standards relate to safety rather than health issues.

[3] P.L. 91-173 as amended by P.L. 95-164, Sec. 103.

THE EVOLUTION OF OSHA INSPECTION TARGETING

Congressional Exemptions

The evolution of OSHA's targeting of safety inspections began in the mid-1970s. (Read the graph on page 4 clockwise for historical representation.) From the congressional perspective, soon after its inception, OSHA began to develop a reputation for "overregulating" businesses, particularly small businesses. Cries from employers for OSHA's containment came in part from the way in which OSHA enforced "to the letter" the many consensus standards which it had adopted from the American National Standards Institute in OSHA's first six months of existence. While some of these standards enforced with such vigor were crucial to maintaining health and safety, others bore little relevance.

Because no legislation to curb OSHA's zeal was forthcoming from House and Senate Labor committees, amendments were introduced directly from the floor of the House and Senate and tacked onto appropriations legislation to provide some relief for small businesses from OSHA's enforcement efforts. Floor debate on some of these amendments began as early as 1975, but no amendment was actually passed by both houses until 1977.[5]

Farm Exemption

The first group of workers to be affected by congressional amendment was those employed on small farms. Farmers are required to comply with only a handful of OSHA standards.[6] Nevertheless, small-farm owners, who were being inspected to some degree in OSHA's early years, protested loudly against OSHA's inspection activities in their sector. In addition, they began protesting even more loudly on two other counts. First, they complained that a low-literacy English version of an OSHA booklet on safety with beef cattle insulted their intelligence; and second, they ridiculed OSHA's proposed field sanitation standard, (dubbed by some the "portable potty" standard), which would require readily accessible fresh drinking water and bathroom facilities within a reasonable walk for field farmworkers.[7]

---

[4] Health hazard targeting is also used as a basis for conducting health inspections. Health hazard targeting, however, has been done administratively, rather than with congressional assistance.

[5] See Congressional Record, Sept. 24, 1975. p. S. 16672.

[6] These standards concern: roll-over protective structures for tractors; reflective triangular slow-moving vehicle markers for farm equipment traveling on the highway; guarding of farm field equipment; specific handling procedures for anhydrous ammonia fertilizer; and specific requirements relating to migrant farmworker operations.

After considerable floor debate on the plight of farmers under OSHA, Congress attached to the FY 1977 appropriations bill covering the Department of Labor, a prohibition of funding for all OSHA activities (including recordkeeping activities) related to any farms with 10 or fewer employees.[8] At that time, about 90 percent of all farms were excluded by the amendment.[9]

This amendment, as with virtually all ensuing OSHA-related amendments, was simply rolled over into subsequent appropriations bills. Beginning with FY 1979, however, in another appropriations amendment Congress brought previously exempted small farms with migrant farmworkers back under OSHA's purview.[10] Today, the small farm amendment exempts about 87 percent of all farms and 40 percent of all farmworkers.[11] However, since farmworkers constitute such a small portion of the entire U.S. workforce, the amendment exempts fewer than one-half of one percent of the entire U.S. workforce.

Recreational Hunting, Shooting and Fishing Exemption

Beginning in FY 1979, Congress also exempted from all OSHA activities a very small, and essentially uncounted number of workers associated with recreational hunting, shooting, and fishing.[12] Before exemption, this group had been the target of little or no inspection efforts by OSHA; the exemption was intended to allay fears of potential OSHA interference in this corner of the sporting world.

Small Business Exemption

Next, in FY 1980, under continuing protest from small business owners, and after considerable legislative debate in previous years, Congress exempted from OSHA general schedule safety inspections

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[7] See Congressional Record, June 24, 1976, p. H. 6603-15, and June 30, 1976, p. S. 11105-9. In addition, on April 28, 1987, OSHA finally issued the field sanitation standard for field farmworkers.

[8] P.L. 94-439, Sept. 30, 1976, OSHA salaries and expenses.

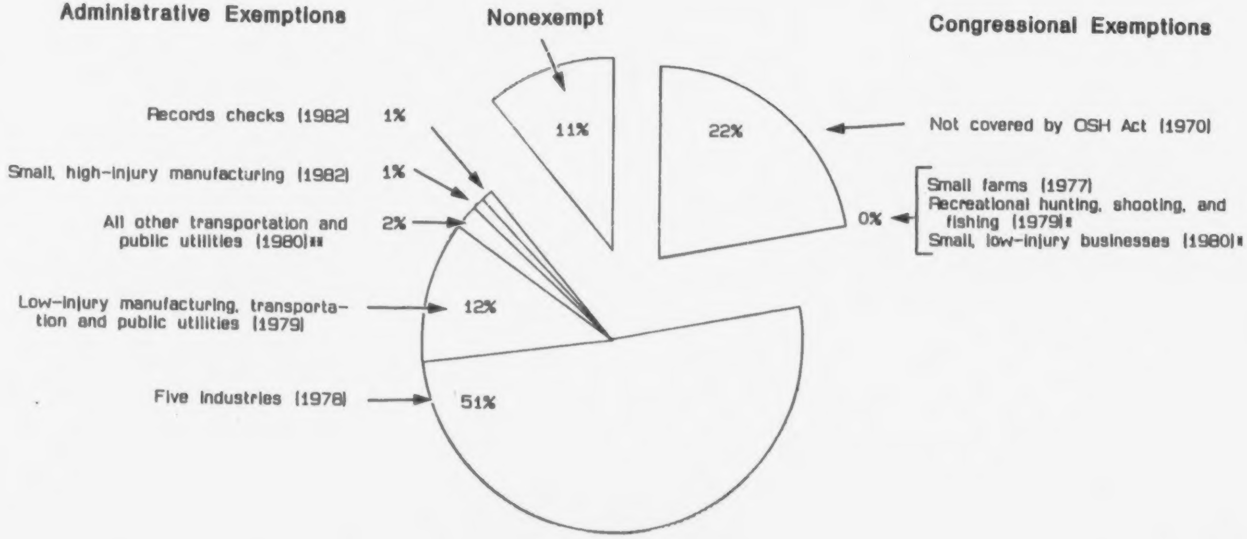
[9] U.S. Department of Commerce. Bureau of the Census. County Business Patterns, 1974, United States, table 1B.

[10] P.L. 95-480, Oct. 18, 1978, OSHA salaries and expenses.

[11] U.S. Department of Commerce. Bureau of the Census. County Business Patterns, 1985, United States, table 1B.

[12] P.L. 95-480.

OSHA Scheduled Safety Inspections
History of Exemptions



(Percent of all Workers)

See Table 1 for data.
Number in parentheses is first year of exemption.
* Duplicates existing OSHA administrative exemption.
** Except for a few high-injury groups.

TABLE 1. OSHA "General Schedule" Safety Inspections
History of Exemptions
(Numbers and Percentages Reflect 1986 Data)

Category		Number of Workers Affected (000)	Percent
TOTAL EMPLOYMENT POPULATION		109,877 g/	100
EXEMPTED BY CONGRESS			
Excluded by OSH Act (1970)			
• State and Local Government Workers a/	13,836		
• Self-employed b/	9,328		
• Workers covered under other safety and health laws: miners, airline, railroad, nuclear workers, etc. a/	1,313		
	24,477	24,277	22
Excluded by Appropriations Amendments			
• Small Farmworkers (FY 1977) c/		151	0
• Recreational hunters, shooters, and fishers (FY 1979)		na	na
• Small, low-injury businesses (FY 1980) d/		(9,125) e/	(8) e/
EXEMPTED BY ADMINISTRATION			
• Five Whole Industries (FY 1978)			
Agriculture c/	231		
Wholesale and Retail Trade a/	23,831		
Finance, Insurance, and Real Estate a/	6,305		
Services a/	23,072		
Federal Government Workers a/	2,899		
	56,418	56,418	51
• Low-Injury Manufacturing, Transportation, and Public Utilities (FY 1979) d/		13,700	12
• Remainder of Transportation and Public Utilities (FY 1980) a/d/ (except maritime operations -- SIC 4463)		2,038	2
• Remaining Small Manufacturing Businesses (FY 1982) a/c/d/		627	1
• Records Checks (FY 1982) (13.3 percent of manufacturing group below)		900	1
NONEXEMPT			
Large high-injury manufacturing a/c/d/f/	5,866		
All construction a/	4,960		
All oil and gas extraction c/	464		
Maritime operations c/d/	313		
	11,603	11,603	11

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a/ Employment and Earnings, March 1987, table B1. p. 43.
b/ Bureau of Labor Statistics unpublished data.
c/ County Business Patterns, table 1B, adjusted to reflect 1986 employment changes.
d/ Estimates reflect data combined from 3 sources: County Business Patterns, table 1B (1985 data); multipliers made by comparing employment data for each major industry division in 1985 and 1986; and OSHA listing of exempt industries as printed in Bureau of National Affairs Occupational Safety and Health Reporter Sept. 3, 1986, p. 21:9471 and 9472.
e/ Already exempted under 1978 and 1979 administrative exemption.
f/ Fewer than 900,000 workers exempted by records checks.
g/ Numbers may not add due to rounding.
na: data not available.

small businesses of 10 or fewer workers in low-hazard industries whose overall injury rate on the basis of Bureau of Labor Statistics (BLS) data was below the national average.[13] As it rolled over into subsequent appropriations bills, the amendment evolved so that now it exempts businesses of 10 or fewer workers in 4-digit standard industrial classification (S.I.C.) code industries with lost workday injury rates below the national average. (The lost workday injury rate is the number of injuries per 100 full-time workers that result in absence beyond the day of injury.) This amendment currently exempts about 9 million workers, or 8 percent of all U.S. workers.

Administrative and Judicial Exemptions[14]

Meanwhile, little noted (and less publicized) during the years when Congress was busily debating various business exemptions from OSHA inspections was the fact that OSHA had already begun quietly eliminating certain groups from its targeted list of operations slated for inspection. No doubt OSHA's activities were partly in response to congressional activity, partly in response to a need to make the best use of scarce OSHA inspection resources, and partly in response to a Supreme Court ruling (mentioned further below). Nevertheless, by the time Congress finally adopted both the recreational hunting, shooting, and fishing amendment (which as mentioned before affected a very small number of workers) and the small business amendment, both amendments had already been put into effect by OSHA administrative action.

Small Business Exemption

As early as FY 1978, the year after Congress passed the small farm amendment and two years before Congress finally adopted the small business exemption, OSHA began exempting other groups from its scheduled safety inspections, including all remaining agricultural workers, and workers in: wholesale and retail trade; finance, insurance, and real estate; services; and the Federal Government. Workers in these and other exempt industries are still eligible for OSHA accident, complaint, referral, follow-up, and other specific safety inspections, which together account for about 40 percent of all OSHA inspections. However, in 1987, less than 13 percent of all inspections, health or safety, occurred in any industry other than those specifically targeted. Logistically, OSHA had begun ranking industries in order of hazardousness on a State-by-State basis, and supplying to regional areas lists of names and addresses of all firms in a given industry in a coverage area. By 1978, OSHA had restricted this list to industries in manufacturing and transportation.

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[13] H.R. 4389, p. 11, P.L. 96-86, Oct. 12, 1979.

[14] Information in this section was obtained from OSHA's Office of Data Analysis.

Later in 1978, the Supreme Court handed down its decision in Marshall v. Barlow's, Inc., 436 US 307 (1978), -- a decision which further insured that OSHA's newly initiated inspection targeting would become permanent. This decision requires OSHA to show probable cause that an OSHA violation exists in order to obtain a search warrant, and thus gain entry to a business when it resists opening its doors to an OSHA inspector. OSHA determined that the best way to show probable cause is to establish that an industry of which a potentially inspected business is a member has a high injury rate. Accordingly, after Barlow's, the industry ranking lists which OSHA had annually obtained from BLS and distributed to its regions as advisory listings for inspection targeting became mandatory and for the most part exclusive lists from which general schedule safety inspections would be launched.

Other Industry Exemptions

In 1979, still adjusting its enforcement efforts in keeping with Barlow's, OSHA granted additional exemptions from its general schedule safety inspections to low-injury manufacturing, transportation and public utilities workers. One year later, in 1980, OSHA exempted the remaining transportation and public utilities workers, except for about 65,000 workers in maritime operations. Accordingly, only about 13 million workers (12 percent of all workers) were left under OSHA's purview for general schedule safety inspections. Industry coverage was limited to: high-injury manufacturing, construction, oil and gas extraction, and maritime operations.

Small Manufacturing Exemption; Records Checks

The narrowing of OSHA's targeting continued. In 1982, OSHA stopped inspecting all high-injury manufacturing businesses with 10 or fewer workers. Then, also in 1982, it began its "records check" program.[15] Under this program, when an OSHA inspector entered a workplace to inspect it, he would first look at the accident report logs. If the logs showed that the lost workday injury rate was below the national average for manufacturing, the inspector would close the books and conclude the inspection. From 1982 through 1985, about 35 percent of all manufacturing inspections, on average, were only records checks. That number has declined in the years since 1985 as inspectors have elected to carry out a complete inspection in a certain percentage of cases where records checks reveal a low injury rate. This is in response to national concerns about the possibility of employers falsifying injury records to avoid and OSHA inspection. For FY 1987, only records checks occurred in about 14 percent of all manufacturing inspections.

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[15] For details, see: Bureau of National Affairs. Occupational Safety and Health Reporter, Vol. 11, No. 10, Aug. 6, 1981. p. 187.

Altogether, OSHA's small, high-injury manufacturing and records checks exemptions eliminated from general schedule safety inspections another 2 percent of all workers. Currently, OSHA targets for inspection, the workplaces of the remaining 12.5 million workers, or about 11 percent of all employees: those in large, high-hazard manufacturing operations, all construction, oil and gas extraction, and maritime operations, and from time to time, other small target industries, such as grain elevators.

INSPECTIONS

Inspection data since 1973 verifies OSHA's targeting program. (See table 2.) These data cover all OSHA inspections -- safety and health inspections are not broken out separately. However, the proportions in the various industries give some indications of OSHA's focus. OSHA has four industry categories of inspections: construction, maritime,[16] manufacturing, and the catch-all "other." The three major industry categories reflect the three major groups of industry standards. A fifth category, "records checks," double counts figures already imbedded in the industrial category "manufacturing."

In table 2, note the following:

- OSHA's increasing inspection targeting in construction, manufacturing, and maritime operations in the late 1970s is reflected in the category called "other" which dropped in 1980 from a previous range of 19 to 23 percent, to 14 percent of all inspections, and has gone even lower since.

- OSHA's increasing focus on the construction industry, which has the highest fatality rate of all major industry divisions (33 deaths per 100,000 workers in 1986 -- see table 4), is reflected by a steady increase from 27 percent of all inspections in 1973 to 58 percent in 1987. (Construction inspections represent 38 percent of the inspection-targeted workers, but only 4.5 percent of all workers.)

- The proportion of OSHA inspections accounted for by manufacturing, which has a rate of only 6 fatalities per 100,000 workers for 1986, has declined steadily from a high of 52 percent in 1977-78 to 28 percent in 1987.

- Targeted maritime operations receive very little OSHA inspection attention (only about 1 percent of all inspections) even though they have their own set of standards applying to large portions of the maritime industry under OSHA's umbrella.

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[16] Maritime operations consist of 4 S.I.C. codes: shipbuilding and boat building in manufacturing (S.I.C. 3731 and 3732), marine cargo handling (S.I.C. 4463) in transportation and public utilities, and bridge building, (S.I.C. 1620) in construction.

TABLE 2. Distribution of OSHA Inspections
(Number and Percent of All Inspections)

YEAR	Construction	%	Maritime	%	Manufacturing	%	Other	%	Records Checks a/	%	Total
1973	13,246	27	7,811	16	21,871	45	5,481	11	0		48,409
1974	26,820	35	5,457	7	33,541	43	11,324	15	0		77,142
1975	23,395	29	2,229	3	36,773	45	18,581	23	0		80,978
1976	28,639	32	1,647	2	39,566	44	20,630	23	0		90,482
1977	15,561	26	1,368	2	31,290	52	11,785	20	0		60,004
1978	14,561	25	1,335	2	29,969	52	11,413	20	0		57,278
1979	17,798	31	1,450	3	27,428	48	11,058	19	0		57,734
1980	26,223	41	1,062	2	27,224	43	8,854	14	0		63,363
1981	25,922	45	1,096	2	22,576	40	7,400	13	6		57,000 (56,994)*
1982	29,297	56	847	2	18,013	34	4,626	9	8,442	14	61,225 (52,783)
1983	34,020	49	849	1	29,456	43	4,593	7	10,402	15	68,918 (58,516)
1984	37,401	52	1,023	1	26,075	37	6,872	10	9,253	13	71,371 (62,118)
1985	39,425	55	918	1	23,419	33	7,541	11	7,136	10	71,303 (64,167)
1986	34,859	54	762	1	20,689	32	8,025	12	4,631	7	64,335 (59,704)
1987	35,456	58	735	1	17,384	28	7,891	13	2,395	4	61,466 (59,071)

a/ Records checks are embedded in manufacturing inspections.

* Numbers in parentheses are total number of complete inspections (total inspections less records checks in manufacturing.)

Source: OSHA, Office of Data Analysis.

EVALUATION OF OSHA'S TARGETING PROGRAM

A key question for examination in this paper is: in the nearly two decades since OSHA's inception, how effective has OSHA's targeting program been in reducing injury and fatality rates in the industries under OSHA's umbrella? Historical records of lost workday injury and fatality rates among the 9 basic industry divisions and 2 industries are included as tables 4 and 5 respectively.

Table 3 summarizes the findings on tables 4 and 5 in two ways. First, it reports changes in fatality and injury rates over three periods of time: the entire 14-year period for which data are available, and two sub-periods corresponding roughly to two business cycles within that time. Second, it ranks industries in terms of how well they performed in reducing fatality and lost workday injury rates over these periods of time.

Injury data reported in these tables are from BLS, whose occupational injury data, based on recordkeeping prescribed under the Occupational Safety and Health Act, are generally consistent and comparable since 1973. Fatality data are from the National Safety Council, whose occupational fatality data, based on State vital statistics, are generally consistent and comparable since 1933.

What do tables 3, 4 and 5 show overall? Examination of tables 4 and 5 reveals two striking findings. First, while all industries under OSHA's purview show declines in fatality rates between 1973 and 1986, not a single major industry division, and only one of the two sub-divisions shows a decline in lost workday injury rates.

Second, these findings contrast sharply with those for the mining industry alone, which is the only major industry division to show a decline in both the fatality rate (58 percent) [illegible] the lost workday injury rate (28 percent) over the 14-year period.

Third, two of the top four most hazardous industries in terms of fatality rate, agriculture and transportation and public utilities, are exempt from OSHA general schedule safety inspection; and while some OSHA targeted industries show some of the greatest improvement in fatality and injury reduction, these two nontargeted industries show some of the least improvement. The sections that follow examine each of these major findings concerning tables 3, 4, and 5 in greater detail.

TABLE 3. Changes in Occupational Fatality and Lost Workday Injury Rates,
1973-79, 1979-86, and 1973-86
(Percent Change and Rank)

	Change in Fatality Rate						Change in Lost Workday Injury Rate					
	% 73-79	Rank	% 79-86	Rank	% 73-86	Rank	% 73-79	Rank	% 79-86	Rank	% 73-86	Rank
OSHA TARGETED INDUSTRY												
Construction	-27	(2)	-37	(1)	-54	(2)	13	(1)	0	(7)	13	(4)
Manufacturing	13	(7)	-33	(2)	-25	(6)	33	(6)	-21	(3)	5	(2)
Maritime a/	na		na		na		37	(8)	-12	(5)	20	d/
Oil and Gas Extraction b/	na		na		na		21	(3)	-43	(1)	-32	d/
NON-OSHA-TARGETED INDUSTRY												
Agriculture	-11	(5)	-4	(7)	-15	(8)	28	(5)	2	(8)	26	(6)
Mining c/	-52	(1)	-11	(5)	-57	(1)	18	(2)	-39	(2)	-28	(1)
Transportation and Public Utilities	-14	(4)	-10	(6)	-23	(7)	35	(7)	-17	(4)	12	(3)
Wholesale and Retail Trade	-14	(4)	-33	(2)	-43	(4)	26	(4)	-3	(6)	22	(5)
Finance, Insurance, and Real Estate	na		na		na		13	(1)	0	(7)	13	(4)
Services	-3	(6)	-29	(3)	-50	(3)	33	(6)	4	(9)	39	(7)
Government	-15	(3)	-27	(4)	-39	(5)	na		na		na	
MSHA-TARGETED INDUSTRY												
Coal, Metal, Nonmetal Mining	na		na		na		16		-33		-22	

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a/ Sub-industry S.I.C. numbers 3731, 3732, and parts of 1620 and 446. See footnote b/ in table 5.

b/ Sub-industry S.I.C. 13.

c/ Mining is targeted partly by OSHA (oil and gas extraction) and partly by MSHA (coal, metal, and nonmetal mining.) Both are included on this table.

d/ To maintain a distinction between industries and industry divisions, we have not integrated the former into the ranking of the latter.

na: data not available

TABLE 4. Fatality Rates per 100,000 Workers

INDUSTRY	73	74	75	76	77	78	79	80	81	82	83	84	85	86	% Change 73-86
All Industries	17	15	15	14	14	14	13	13	12	11	11	11	11	10	-41
Agriculture	61	54	58	54	53	54	54	61	54	52	52	46	49	52	-15
Mining a/	117	71	63	63	63	63	56	50	55	55	50	60	50	50	-57
Construction	71	63	61	57	60	57	52	45	40	40	37	39	37	33	-54
Manufacturing	8	8	8	9	9	9	9	8	7	5	6	6	6	6	-25
Transportation and Public Utilities	35	34	33	31	33	29	30	28	31	26	25	27	29	27	-23
Wholesale and Retail Trade	7	6	6	6	6	6	6	6	5	5	5	5	5	4	-43
Finance, Insurance, and Real Estate b/	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na
Services	10	10	9	9	8	7	7	7	7	6	7	7	6	5	-50
Government	13	13	12	11	11	11	11	11	10	10	10	9	8	8	-39

a/ Mining includes coal, metal and nonmetal mining under MSHA and oil and gas extraction under OSHA.

b/ The National Safety Council offers no fatality rates on finance, insurance, and real estate workers. OSHA has some figures on occupational fatality rates which are based on employer reports to BLS, and which are not strictly comparable to National Safety Council figures. (As mentioned before, the National Safety Council figures are based on State vital statistics.) Comparison of the two sets of figures in the various major industry divisions for 1985 (the most recent year for which BLS data are available) shows that the BLS fatality rates range from about 30 to 83 percent of the National Safety Council figures. On the basis of this proportional range, the fatality rate for 1985 for finance, insurance, and real estate is about 2 to 5 fatalities per 100,000 workers.

Source: National Safety Council, Accident Facts, various editions, 1972-1987.

TABLE 5. Lost Workday Injury Rates per 100 full-time Workers

INDUSTRY	73	74	75	76	77	78	79	80	81	82	83	84	85	86	% Change 73-86
AVERAGE, Private Sector	3.3	3.4	3.2	3.4	3.7	4.0	4.2	3.9	3.7	3.4	3.4	3.6	3.6	3.6	9.0
Agriculture a/	4.3	4.2	4.2	4.4	4.8	5.2	5.5	5.6	5.8	5.7	6.0	5.9	5.6	5.4	25.6
Mining b/	5.7	5.0	5.6	5.7	5.9	6.4	6.7	6.4	6.2	5.4	4.4	5.3	4.7	4.1	-28.1
Construction	6.0	5.9	5.4	5.4	5.8	6.3	6.8	6.5	6.3	6.0	6.2	6.9	6.8	6.8	13.3
Manufacturing	4.3	4.5	4.3	4.6	4.9	5.4	5.7	5.2	4.9	4.3	4.2	4.5	4.4	4.5	4.7
Transportation and Public Utilities	4.3	4.7	4.6	4.9	5.2	5.7	5.8	5.4	5.2	4.8	4.7	5.1	4.9	4.8	11.6
Wholesale and Retail Trade	2.7	2.7	2.6	2.8	2.9	3.1	3.4	3.2	3.1	3.0	3.1	3.2	3.2	3.3	22.2
Finance, Insurance, and Real Estate	0.8	0.8	0.7	0.7	0.8	0.8	0.9	0.8	0.8	0.9	0.8	0.9	0.9	0.9	12.5
Services	1.8	1.8	1.9	1.9	2.2	2.3	2.4	2.3	2.3	2.3	2.3	2.4	2.5	2.5	38.9
Government	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na
Maritime Operations c/	7.9	9.1	9.8	9.7	9.5	5.6	10.8	11.1	10.8	9.8	8.8	9.6	8.9	9.5	20.3
Oil and Gas Ex-extraction d/	5.7	5.4	6.1	5.9	6.2	6.9	6.9	6.6	6.6	5.5	4.6	5.9	5.3	3.9	-31.6
Coal, metal, and nonmetal mining e/	5.8	4.9	5.7	5.9	5.9	6.0	6.7	6.4	5.6	4.3	4.3	4.3	4.0	4.5	-22.4

Note: underlined rate denotes injury peak.

a/ Beginning with 1975, these rates include only farms with 11 or more workers.

b/ This includes both metal, nonmetal, and coal mining under MSHA and oil and gas extraction under OSHA. Injury rates for both industries are listed at the bottom of this table.

c/ Includes S.I.C. codes 3731, 3732, and parts of 1620 and 446. Lost workday injury estimates were calculated by CRS using U.S. Department of Commerce, County Business Patterns, 1985 employment levels for relative proportions, and annual BLS injury rate data for these S.I.C. codes.

d/ S.I.C. 13.

e/ CRS has estimated rates for coal, metal, and nonmetal mining combined from employment levels and injury rates for individual component industries included in press releases or annual BLS publications entitled: Occupational injuries and illnesses in the United States, by industry.

na: not available

Source: Bureau of Labor Statistics.

Discrepancy Between Fatality and Injury Rate Changes

To a certain extent the decline in fatality rates is part of a strong long-term trend toward lower fatality rates that was evident long before OSHA was born. Since 1933, for example, occupational fatality rates for all industries combined, have declined by about 75 percent.[17]

Long-term declines in fatality rates reflect a number of other influential factors in addition to any OSHA impact. These include improvements in technology; increasing trends toward automation; and improvements in medical treatment, so that accidents which in the past may have produced fatality, may now produce "only" serious injury.

While occupational fatality rates display a distinct long-term downward trend, occupational injury rates display a distinct cyclical pattern. These injury rates tend to drop during recessions, as newer, less experienced, more accident-prone workers are laid off first, and then to begin slowly climbing back up again during economic recoveries and subsequent expansions, as production demand is met by hiring new, less experienced, and therefore potentially more accident-prone workers.

In the absence of strong overriding outside influences, such as long-term improvement in safety, or external factors causing an increase in accident rates, lost workday injury rates should remain fairly stable when measured, for example, from business cycle peak (i.e. 1973) to peak (i.e. 1979) to peak (i.e. 1986).[18]

The fact (see table 3) that without exception all industries show an increase in lost workday injury rates between 1973 and 1979, suggests that overriding outside influences may be causing this rise. What are these?

Several possibilities for these new trends or influences are as follows: First, improvements in workers' compensation benefits over time may have encouraged workers to remain out of work beyond the day of injury. Second, greater cautiousness on the part of attending physicians may have encouraged workers to stay off the job longer to make certain the injury is not more severe than it appears. Third, in many cases a clearer determination of the work-relatedness of certain injuries, such as back injuries and similar afflictions, may have resulted in a higher count of work-related injuries.

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[17] National Safety Council. Accident Facts, 1987. p. 34.

[18] For measurement purposes here, 1986 (the most recent year for which data are available) is also treated as a peak year, even though it occurs before the peak. Measuring to a point like this which falls before the actual peak in the business cycle, however, generally overstates injury improvement, since injury rates in a mature expansion tend to increase slightly each year until the next recession arrives.

A fourth possibility may have played an even larger role. One long-term downward influence on injury rates has traditionally been that during economic expansions, employers have tended to substitute capital for labor wherever possible to increase output, since capital has tended to be a less expensive input than labor. However, in the expansion that followed the recession after the Arab oil embargo which began in 1973, the increase in energy prices and interest rates, together with the relative lack of newly needed energy-efficient machinery, encouraged employers to do the opposite.

Accordingly, this time, a certain amount of substitution of new labor for new capital to meet demands for additional inputs was encouraged by the fact that the oil embargo made energy prices relatively more expensive while the abundance of labor from both the "baby boom" generation and increasing numbers of women entering the workforce, made the price of labor relatively less expensive. Any resulting substitution of labor for capital would have tended to push injury rates upward in the same way that hiring more workers toward the end of a business expansion does: Newly hired workers tend to have higher injury rates.

Contrast of Injury Rate Performance in MSHA and OSHA Industries

As mentioned, the one industry that did not show a contradiction between changes in fatality rates and changes in serious injury rates was mining. This mining reflects an industry about half under the Mine Safety and Health Administration (MSHA -- coal, metal and nonmetal mining) and half under OSHA (oil and gas extraction). The question is: what is causing the tremendous difference in performance between mining and other industries? For one thing, the mining industry has been in a slump. Between its high in 1979, and 1986, the mining population under MSHA declined by about 33 percent. A long term decline in employment in a given industry can influence fatality and injury rates downward in the same way that a cyclical decline in employment can.

Also, previously noted, those mines under MSHA are required by law to be inspected much more than places of employment under OSHA. The Mine Safety and Health Act currently mandates the inspection of each underground mine four times a year, and the inspection of each surface mine at least twice a year. In contrast to this heavy inspection requirement under MSHA, approximately 85 percent of workers covered under OSHA can never expect a general schedule safety inspection at their worksite.[19] In all, about 21 percent of the remaining workers in the group targeted for such OSHA general schedule safety inspections are in actual operations inspected in a given year, and another 39 percent are in non-inspected operations within establishments that are inspected.[20] Thus, in contrast to MSHA's inspection guarantee, the probability of even specifically targeted workers under OSHA being inspected is, at best about once every 2 to 5 years.

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[19] Currently this includes about 72.8 million workers who are not on the targeted list out of about 85.6 workers covered by the OSH Act.

Possibly contributing to the discrepancy between fatality and injury rate declines between MSHA and OSHA-covered workers is the per-worker appropriation under both the Mine Safety and Health Act and the Occupational Safety and Health Act. For 1987 Congress appropriated approximately $500 to protect the safety and health of each miner covered; while Congress appropriated approximately $18 to protect each worker in OSHA's select target group, or about $2.50 to protect each worker under OSHA's entire umbrella.[21]

Poor Showing of Hazardous Exempt (and Some Targeted) Industries; Relatively Good Showing of Other Targeted Industries

One way of evaluating OSHA's targeting is to compare the four targeted industry groups with the 7 exempt industries to see which have the greatest fatality and injury rate reductions over all. In the text and tables that follow, differentiation should be kept in mind between "industry divisions" and "industries".

"Industry divisions" refers to the 9 major industry groups in the economy. "Industry" refers to the two main OSHA-targeted sectors that are not complete industry divisions: maritime operations and oil and gas extraction. Maritime operations include longshore operations from the transportation and public utilities division, and bridge construction operations from the construction division. Oil and gas extraction is the OSHA part of the mining division. No fatality rate data are available on the two industries (maritime operations and oil and gas extraction). For the sake of consistency, rankings are attached only to industry divisions. In general, what tables 3, 4, and 5 show is that:

1. Two exempt high-hazard divisions, agriculture and transportation and public utilities, fared worst.

Agriculture has traditionally had the highest fatality rate of all 9 major industry divisions, with 52 fatalities per 100,000 workers in 1986. It also has the second highest injury rate, with 5.4 injuries per 100 full-time workers. Overall, agriculture showed the least improvement in these rates between 1973 and 1986, ranking last of all major industry divisions in both categories.

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[20] Currently, about 12.5 million workers are in industries targeted for inspection. OSHA inspection figures from its Office of Data Analysis indicate that in FY 1987, 7.5 million were employed in inspected establishments, and 2.7 million were actually covered by OSHA inspections.

[21] The 1987 congressional appropriation for MSHA was $156.5 million; for OSHA it was $225.8 million.

Transportation and public utilities fared slightly better. In 1986 it had the 4th highest fatality rate of all major industry divisions, with 27 fatalities per 100,000 workers, but only the 5th highest serious injury rate, with 4.8 serious injuries per 100 full-time workers. However, this industry division ranked second-to-last in terms of fatality rate reduction, though it scored a respectable third best in terms of injury rate reduction.

2. One targeted industry, maritime, fared poorly.

Targeted maritime operations, with an employment population about the size of agriculture, ranked a distant 6th in terms of lost workday injury improvement, based on CRS estimates of actual combined lost workday injury rates for the four industries included.[22] This industry has a higher injury rate than any of the industry divisions under examination, with 9.5 injuries per 100 full-time workers. Even though this industry is targeted, it receives only about 1 percent of all OSHA inspections.

3. One targeted division, manufacturing, showed mixed results.

Targeted manufacturing, which has one of the lowest fatality rates overall, ranking 6th out of 8 industry divisions, improved its fatality rate very little, even though it has been the focus of about 40 percent of all inspections over the past 15 years. Nevertheless, it did rank 3rd in improving its injury rate. In terms of actual serious injury rate it was 4th out of the 8 major industry divisions for which National Safety Council fatality data exist, with 4.5 lost workday injuries per 100 full-time workers.

4. Two out of the four targeted groups performed well.

The targeted oil and gas extraction industry ranked above all industry divisions in terms of injury rate reduction. It reduced its lost workday injury rate by 32 percent gradually, from a high of 6.9 per 100 full-time workers in 1979 to 3.9 in 1986. This is an industry which experienced considerable employment growth in the late 1970s and early 1980s in response to the energy crisis, and subsequent employment decline in the later 1980s. Currently employment in this industry is still more than one and a half times what it was in 1973.

Construction receives more targeting than any other group, with 58 percent of all OSHA inspections. With the third highest fatality rate, 33 per 100,000 workers, it shows the second best fatality rate reduction of any division. However, it has fared a distant 4th in efforts to reduce its lost workday injury rate, which ranks as the highest of any division, with 6.8 lost workday injuries per 100 full time workers.

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[22] See Table 5, footnote b/ for methodology. See also, footnote 16/ for a definition of the maritime industry.

In Defense of OSHA: Certain Industries are More Susceptible to OSHA Targeting

Some of the findings above, from tables 3, 4, and 5, might suggest that OHSA is not concentrating its energies on some of the industries that could possibly benefit most from its enforcement efforts. In defense of OSHA's not targeting the two high-injury and fatality rate divisions -- agriculture, and transportation and public utilities -- it can be argued that certain groups of workers are not as susceptible to OSHA's efforts to reduce injury and fatality rates.

As table 6 shows, about 50 percent of the fatalities in all industries fall into what will hereafter be referred to as the "less OSHA-controllable" category, stemming from four causes on which OSHA standards have little or no effect: highway vehicle accidents, heart attacks, assaults (including gunshot wounds), and airplane crashes; and/or causes which fall under the jurisdiction of other safety and health laws.

The 9 major divisions fall naturally into three groups, according to their proportions of these less-OSHA-controllable fatalities. (No similar study exists analyzing the cause of injuries.) In the first group are three divisions: construction, manufacturing, and the oil and gas extraction industry, which can attribute less than 35 percent of their fatalities to these causes. These groups are good candidates for OSHA targeting, and OSHA has the potential for having a relatively large impact on health and safety in these groups. In fact, these industries show some of the best safety improvement over OSHA's history.

The second category is agriculture. For 1985-86, the most recent time period for which statistics are available, 57 percent of the fatalities are in this less-OSHA-controllable category. This proportion has shown a consistent and dramatic trend upward since 1982-83, when only 30 percent of the agricultural fatalities were in this less-OSHA-controllable group. Closer examination of the data over this 4-year period reveals that the largest jump has been in assaults in 1985 and 1986, when the farm economy was in such upheaval, and in work-related aircraft crashes (e.g., crop dusting) in 1984-85 and 1985-86.

The third category consists of four industries: transportation and public utilities; wholesale and retail trade; finance, insurance and real estate; and services. It has on average 70 to 77 percent of its fatalities outside the realm of OSHA efficacy. By far the predominate cause of these fatalities is highway vehicle accidents.

TABLE 6. Causes of Fatalities, 1985-86
(Percent of all Fatalities in Industry)

CAUSE OF FATALITY	Total	Agriculture	Oil/Gas Extraction	Construction	Manufacturing	Transportation & Public Util.	Wholesale & Retail Trade	Finance Insurance & Real Estate	Services
Outside OSHA Control									
Highway Vehicle	33	27	24	12	18	60	39	64	41
Heart Attack	8	7	6	8	6	5	11	7	13
Assault	5	8	*	*	1	3	19	*	14
Aircraft Crash	5	15	0	3	7	7	1	6	7
SUB-TOTAL	51	57	30	23	32	75	70	77	75
Within OSHA Control									
Fall	8	1	12	16	8	2	7	15	2
Industrial Vehicle or Equipment	11	12	23	17	15	6	9	6	2
Electrocution	7	11	7	16	6	5	4	*	3
Caught in, under, or between object	7	1	2	17	7	4	4	0	2
Explosion	4	1	3	2	6	4	1	*	9
Struck by Object	4	3	12	2	10	1	2	1	2
Fire	2	5	5	1	4	*	*	0	1
Plant Machinery operation	1	0	0	*	6	*	*	0	1
Gas Inhalation	2	3	5	2	3	1	0	0	2
All Other	3	7	1	2	5	2	2	1	3
SUB-TOTAL	49	44	70	75	70	25	29	23	27

Source: Bureau of Labor Statistics, Occupational Injuries and Illnesses in the United States by Industry, 1986, table 11. (not yet published.)

* Indicates value of less than 0.5 percent.

CONCLUSIONS AND POLICY CONSIDERATIONS

OSHA seems to be making the most progress in the industry division where it focuses the most inspection attention: construction. OSHA's relatively successful experience with construction is similar to, though not quite as good as MSHA's and OSHA's combined successful experience with mining.

However, it is important to recognize that the successful experience in mining, especially that in the traditional mining industries under MSHA, has not come cheaply. The Federal Government spends nearly 30 times the amount per miner under MSHHA as it does on each of the 12.5 million targeted workers under OSHA. If the Federal Government were to spend as much on each of the 12.5 million targeted workers under OSHA as it spends on each miner ($500) the OSHA appropriation would be $6.2 billion, rather than, for example, the current $225.8 million appropriated for FY 1987. If the Federal Government were to spend $500 on each of the nearly 5 million construction workers under OSHA's jurisdiction, the agency would need an appropriation of nearly $2.5 billion; yet it would not necessarily follow that such expenditure would result in injury and fatality rate reduction equal to that which has occurred in mining.

Accordingly, OSHA's relative success in reducing the injury and fatality rates in the construction industry suggests that OSHA is getting some positive effects from concentrating its limited resources.

Construction, however, is not the most hazardous industry under OSHA's umbrella. Rather, it is the second most hazardous industry. Agriculture, whose workers have a fatality rate that is almost 60 percent higher than the rate for construction workers, is the most hazardous industry. Yet OSHA spends virtually no money on safety protection for agriculture, even though, after mining construction, and oil and gas extraction, it has the lowest proportion of less-OSHA-controllable fatalities.

Farms may not have as high a proportion of potentially OSHA-controllable fatalities as construction, but it would appear that OSHA's efforts, properly targeted, could conceivably have a substantial effect on reducing injury and fatality rates, with or without issuing additional standards.

One of the several OSHA safety standards relating to agriculture, for example, requires rollover protective bars on tractors. Although tractor rollovers are the major cause of tractor fatalities, deaths result from other types of tractor accidents -- including getting run over by tractors. Altogether, according to the National Safety Council, almost 27 percent of all agricultural fatalities and 47 percent of all permanent injuries are associated with tractors.[23] This suggests an area for OSHA focus. It also suggests that concerted OSHA effort, possibly through such measures as education and training, including use of extension services, bulletins, and other means of emphasis, or through direct inspection, could have a positive impact on a much needed reduction in agricultural fatality and lost workday injury rates.

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[23] National Safety Council. Accident Facts, 1987. p. 95.

The industry that receives the second greatest proportion of OSHA inspections, manufacturing, is actually 6th of all major industry divisions (including mining, partly under MSHA) in terms of fatality rates, with only 6 fatalities per 100,000 workers. This means that in addition to agriculture, OSHA has been not focusing its safety enforcement attention on two other major industry divisions which have higher fatality rates than manufacturing. One of these is transportation and public utilities, and the other is government. Government has a fatality rate at 8 per 100,000 workers, only slightly above manufacturing's 6. However, 83 percent of government employment is at the State and local levels, and thus not directly covered by the Occupational Safety and Health Act. Accordingly, OSHA's non-inspection of government is not an issue to the extent that OSHA's non-inspection of transportation and public utilities may be.

Transportation and public utilities has a fatality rate of 27 per 100,000 workers, only slightly below that of construction's 33 per 100,000 workers. OSHA and its supporters argue that a high percentage of fatalities in transportation and public utilities are outside of OSHA control, including the 60 percent from highway vehicle accidents. Therefore, they say, this industry division is not a good place to focus OSHA's attention. There may be some merit in this argument. However, even if the high percentage of fatalities from highway vehicles is not a good focus for OSHA's attention, it may be a focus for Congress' attention in terms of highway safety legislation.

Table 7 shows a substantial increase in the proportion of occupational fatalities in the last 4 years from highway vehicles in 4 major industry divisions: transportation and public utilities; wholesale and retail trade; finance, insurance, and real estate; and services.

Since 1982, Congress has legislated a number of changes relating to trucks and speed limits. Among other things Congress has: authorized the use of two-tandem trailers, and authorized longer and wider trucks and heavier loads.[24] In addition, Congress has allowed States to raise the speed limit to 65 miles per hour on the rural portions of interstate highways and extended the eligibility for the 65-mile per hour speed limit to certain other highways.[25]

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[24] Surface Transportation Assistance Act of 1982, H.R. 6211, Public Law 97-424, signed by the President on January 6, 1983; and H.R. 7019, P.L. 97-369, enacted Dec. 18, 1982.

[25] P.L. 100-17; and amendment to a continuing appropriations resolution, December, 1987, P.L. 100-202.

However, any effects these last 2 changes may have on occupational fatalities would not yet be reflected in these figures, which only go through 1986.

TABLE 7. Percentage of Fatalities from Highway Vehicles in Several Major Industry Divisions.

	1982-83	1983-84	1984-85	1985-86
Transportation and Public Utilities	33	42	49	60
Wholesale and Retail Trade	14	38	36	39
Finance, Insurance, and Real Estate	5	51	29	64
Services	13	23	28	41

Source: Bureau of Labor Statistics, Occupational Injuries and Illnesses in the United States by Industry, 1983, 1984, 1985, and the forthcoming 1986, table 10.

The fact that the mining fatality and lost workday injury rates have dropped so dramatically in 14 years, and the fact that OSHA's heavily targeted construction has done second best suggests that in concept occupational safety and health laws are traveling along the right path and are having a hand in reducing the fatality and some injury rates. However, the fatality and injury rate experience of several other industrial divisions under OSHA's protective umbrella suggests that greater efforts -- perhaps by the Administration, and perhaps by Congress, may be advisable to adequately oversee fatality and injury rate reduction in other industrial divisions under OSHA's protective umbrella. Nevertheless, continued recognition must be given to the differences that make industries not comparable to one another in being able to effect accident reductions.

mjb

The **Chairman**. The committee stands in recess until 9:00 o'clock tomorrow.

[Whereupon, at 12:20 p.m., the committee recessed, to reconvene at 9 a.m., Wednesday, April 20, 1988.]

OVERSIGHT OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

WEDNESDAY, APRIL 20, 1988

U.S. Senate,
Committee on Labor and Human Resources,
Washington, DC.

The Committee resumed, pursuant to adjournment, at 9:15 a.m., in Room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman) presiding.

Present: Senators Kennedy, Hatch, Metzenbaum, and Pell.

OPENING STATEMENT OF SENATOR KENNEDY

The Chairman. We will come to order.

This morning we begin our last of three days of oversight hearings on the Occupational Safety and Health Administration.

Yesterday, the Committee heard from seven people whose lives have been shattered by workplace death and injury. While the stories of these seven people will be ones that become part of this Committee's permanent record of the performance of this agency, they represent a small fraction of one day's carnage in the workplace.

In the three days of this Committee's hearings, more than 100 workers have died from workplace disease and injury. Their stories will probably never come to the Congress.

They will never be able to ask the people who run the agencies, whose duty it is to protect their lives, why they had to die.

That is our question today. Ours is not a perfect world, free of risk and accident. Nor could we save every life lost to the great gears of commerce. But the testimony of the past two days has made it persuasively and abundantly evident that many thousand need not have died.

Today we will ask those whose duty it is to protect those workers if there was a good reason for the inaction of the agency charged to protect them.

The first panel that we have is the Assistant Secretary of Labor for Occupational Safety and Health, Mr. John Pendergrass; Deputy Assistant Secretary Mr. Frank White; and Assistant Secretary of Labor for Policy, Mr. Michael Baroody.

I know that you have testimony. Mr. Pendergrass, we will start off with you.

STATEMENTS OF JOHN PENDERGRASS, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH; FRANK WHITE, DEPUTY ASSISTANT SECRETARY; AND MICHAEL BAROODY, ASSISTANT SECRETARY OF LABOR FOR POLICY

Mr. **Pendergrass**. Thank you, Mr. Chairman. It is a pleasure to appear before the Committee today to testify to the activities of the Occupational Safety and Health Administration. I look forward to sharing with you my assessment of our current programs and future prospects.

During my years as a safety and health professional, I have seen many improvements in workplace conditions. Progress in this field has accelerated in the 17 years since the passage of the Occupational Safety and Health Act.

Occupational injury rates have gone down by more than 25 percent since 1973, and fatality rates by more than 40 percent during that same period.

The **Chairman**. I want you to run through your testimony without interruption. But we really cannot let that statement go by without being challenged.

We had the representatives of the National Academy of Sciences indicate that, based on their study, that the figures used by OSHA are completely distorted and inaccurate and do not represent a fair compilation of what is really happening in the workplace.

I am sure your people have given you an opportunity since these hearings have started to know that. They have the testimony indicating that the BLS data systems in their current form are inadequate to provide OSHA with the data it needs for maintaining an effective program for the prevention of workplace injuries and illnesses.

Now during the course of that hearing, and I know you had your people here to observe Dr. Pollack, he just indicated quite frankly that there could be very little confidence in the figures that are being used.

And I know you may want to defend or elaborate on those figures. But I do not know whether you have had an opportunity to examine his testimony but it is the result of a National Academy of Science study, made up of individuals who have had a lifetime in evaluating various statistics, and in reviewing how the Agency gathers its statistics, how they use statistics, and what the statistics mean.

And I think in the opening statement, setting the tone, I think if you had some reaction to that testimony of the Academy of Science, I would be glad to hear it.

But I think it raises serious questions about the representations which you have just made.

Mr. **Pendergrass**. Mr. Chairman, the figures that we use, and that are referred to, are the ones that the Agency has used since its inception.

While they may not be entirely precise, it is a relative evaluation of the Agency's activities since 1973.

I think it is the proper way to compare what has happened over the 17-year period. Are there better ways? We are always interested in finding better ways to measure the effectiveness of the

Agency, but more important, to get a better figure on exactly what is occurring in the workplace.

We will certainly take into consideration all the testimony that has been given here, as well as data that we can get from other sources.

We appreciate the opportunity that you have given us to receive this information, and we will be using it in the future.

The CHAIRMAN. Well, I will let you move on. But I would hope that you would have an opportunity to examine that testimony because, I think it is complete with examples of the inadequacy of the calculations that are being made by the Agency with regard to injuries, with regard to deaths.

And the testimony indicated, when the Academy of Science talked to the various individuals within your Agency, they reviewed how they were evaluating your own systems, and they found that there were very serious shortcomings.

I would hope that you would have a chance sometime to look through that testimony, and also, to be able to respond and react to it.

But let us move ahead with your testimony.

Mr. PENDERGRASS. In the past two years, I believe that we have contributed to progress in the following ways.

The pace of regulation, while slow, is yielding results. The most hazardous workplaces are being inspected. Recalcitrant employers are being dealt with severely.

Assistance and encouragement is being provided to those who seek it. And as envisioned by the authors of the OSH Act, OSHA is actively supporting a Federal-State partnership with the States who have chosen to operate Federally approved job safety and health programs.

I intend to illustrate these aspects of our programs and policies in my remarks this morning. I will begin by describing briefly the challenges that are basic to OSHA's mission, and then go on to outline the policies and program initiatives we have adopted to address those challenges.

The Occupational Safety and Health Act was adopted in 1970 as an embodiment of the belief that workers are entitled to a safe and healthful occupational environment.

The Act establishes a general framework within which this goal may be accomplished. It also provides the Agency with a wide range of tools beyond the essential standard setting and enforcement activity, tools such as consultative and educational services, training activities, and encouragement of voluntary protection.

The Act allows all of these means to be enlisted in our efforts, but leaves to the discretion of the Secretary the best way of ordering those activities to achieve the statutory goal.

When I arrived at OSHA less than two years ago, the Agency was facing some hard and fundamental questions, the responses to which were critical to OSHA's future direction and role in the safety and health community.

These hard questions involved two areas at the very heart of OSHA's mission. First, in the area of standard setting, how could the Agency exercise leadership in the regulation of toxic substances, when it was operating with a set of standards 20 or even

30 years out of date, when it was making only fitful progress in issuing a few new standards in a process that has taken five or ten or even fifteen years for a single standard, when it had no clear vision of how to break the regulatory logjam?

The CHAIRMAN. Whose responsibility was that?

Mr. PENDERGRASS. I beg your pardon?

The CHAIRMAN. Whose responsibility? You said the Agency was operating on a set of standards 20 or 30 years out of date; making only fitful progress and issuing few new standards through a process that had taken five, ten and fifteen years for a single standard. No clear vision.

That is a pretty keen indictment of your own about the Agency and how it has been proceeding in six of the last eight years, is it not?

Mr. PENDERGRASS. Mr. Chairman, I think that every assistant secretary for OSHA has faced exactly these same problems, same frustrations. And I think that in our statement, and I think in the testimony that will follow, we will present how we have approached these problems, and are making progress.

The advances in technology in this country have continued to provide new products with a potential for adverse health effects. We have seen that traditional substance-by-substance rulemaking, though necessary in certain cases, is inadequate to the task of providing protection from the large numbers of existing and new chemicals, as the risks involved become apparent.

Clearly, alternate ways of developing regulations and standards are needed.

Second, in seeking maximum compliance with the Act, what was the proper role of enforcement? After spending half a decade attempting to complement its traditional approaches with a full range of services such as consultation and training and voluntary programs designed to encourage safety and health in the workplace, how should we proceed? And, recognizing the constraints within which OSHA has always operated, what enforcement strategies would have the most impact on safety and health?

The Act covers nearly six million work places, and some 83 million workers. The resources devoted to implementation of the Act are finite, and must be used effectively.

Our task is to target inspections to the more hazardous workplaces. The inspections must be of high quality; they must result in abatement; we must devise ways of expanding the impact of our inspection and enforcement efforts, and of moving beyond enforcement.

We need to encourage employers to prevent hazards, and when hazards exist, to correct conditions voluntarily—without an OSHA inspection.

I believe that OSHA's actions here in my tenure have offered answers to these questions. They may not be the only possible answers, and they may not even be the best answers in every case.

But while our discussion today may reveal some differences in our approaches, I am confident that there is a great deal on which we can agree.

I would now like to review briefly our recent initiatives. Each of OSHA's efforts in the past two years have been directed toward one basic goal: To broaden the Agency's impact and influence on safety and health.

Specifically, I have wanted to find ways for OSHA to set broader health and safety standards. I have also tried to assure compliance in a broader spectrum of workplaces through new compliance initiatives.

Let us look at rulemaking. In the regulatory arena, we have had two objectives. First, completing action on some important and in some cases controversial rulemaking projects that had been unresolved too long and were diverting too much of OSHA's time and attention; and second, setting new standard-setting approaches, particularly with health standards.

In almost every case, there was ongoing seemingly endless litigation with either outstanding court orders or strong expressions of judicial impatience. These matters had to be addressed.

There was no way that OSHA could credibly embark on a new regulatory path if it did not first complete work on these few important standards.

We have kept that commitment. Comprehensive standards for field sanitation, benzene, formaldehyde, and grain handling have been issued, two of them without resulting judicial challenges.

An expanded scope Hazard Communication Standard becomes effective in May.

In addition, in the last two years, we have adopted a rigorous interim standard for the protection of workers at hazardous waste sites, as well as several other important final rules, including standards for single piece rim wheels, recordkeeping, electrical standards for construction, and presence sensing devices for mechanical power presses.

We have been extremely busy in standards promulgation and will be for this year. There is no denying, however, that the rulemaking process is slow. The process itself is designed that way, and with good reason. The public participation process, and the economic and feasibility analyses required by law and executive order produce sound regulations which can withstand the challenges that they invariably face when they are finally issued.

Other developments have added to the growing list of requirements for promulgation and enforcement of occupational health and safety standards.

For example, in July, 1980, the U.S. Supreme Court interpretation of the OSH Act in the benzene case imposed new responsibilities for assessment and demonstration of risk.

The Regulatory Flexibility Act, passed that same year, requires that we consider the special needs of small business in our rulemaking.

And the Paperwork Reduction Act, also of 1980, requires that we consider, and limit, if possible, the burden imposed on the public for collection of information needed to develop and implement regulations that we promulgate.

My second important rulemaking task, then, has been to seek alternative ways to respond to existing hazards, as well as new dangers.

OSHA's Hazard Communication Standard, first issued in 1983, provided a base from which to build a comprehensive regulatory framework of protection for America's workers.

Beginning in May of this year, the standard goes into effect for all industrial sectors. Workers can be assured of receiving critical information and training concerning the thousands of potential hazards to workplace substances.

This landmark standard is a generic rule in the truest sense: It is applicable to the broadest possible spectrum of chemical hazards. Moreover, it is dynamic in nature. As new chemicals are introduced into the workplace, and new information about existing chemicals becomes available, the producers must update the information that they provide to their customers. Employers must also update their hazard communication programs to reflect new developments, and to provide their employees with the vital information they need to protect themselves.

While the Hazard Communication Standard is perhaps OSHA's most celebrated achievement, it is not enough. OSHA must also assure that its exposure limits for specific compounds are based on current information.

At present these exposure limits include some 400 air contaminants, supplemented by 24 more comprehensive standards for selected substances.

The threshold limit values, which were recommended in 1968 by the American Conference of Governmental and Industrial Hygienists for over 400 air contaminants, were adopted by OSHA as official exposure limits in 1971.

This was of course under the provisions of section 6(a) of the Act. That section allowed OSHA to promulgate any national consensus standard as an occupational safety and health standard for two years after the effective date of the act, without having to go through the rigorous rulemaking procedures established in section 6(b).

These threshold limit values have become known as the OSHA permissible exposure limits, or PELs. In the 15 years that followed their adoption by the Agency, OSHA has succeeded in issuing comprehensive standards under 6(b) for only 24 additional substances.

The PELs were adopted on the basis of information that is now 20 to 30 years old. OSHA found itself falling further and further behind as it tried to update the basic list of exposure limits with a substance by substance approach.

In order to remedy this problem, we are now working to update, at one time, through the 6(b) rulemaking process, with all of the requirements for public participation, approximately one-half of the 400 exposure limits which need revision.

We will also add exposure limits for 200 other substances, which are presently unregulated by OSHA.

This "PEL project," which we will complete this fall, will be as significant a step in worker protection as the Hazard Communication Standard. It will provide substantially improved protection to millions of workers.

The PEL project itself, however, does not replace comprehensive regulations for health protection. Nonetheless, it is a critical step.

It is impossible to develop comprehensive standards for all of the potentially toxic substances that people may encounter at work.

We will be supplementing this project with other generic steps to protect workers, such as respiratory protection, which soon will be published as a proposal, as well as actions with respect to medical surveillance and exposure monitoring.

We will also be examining the effectiveness of medical surveillance and exposure monitoring in existing OSHA standards, to see what has worked to best protect workers.

OSHA will continue to set comprehensive standards for the substances that warrant specific and detailed consideration.

Looking ahead, we are examining the extent to which employer safety and health programs can reduce accidents and injuries in general industry, and in the shipyard and in longshoring employment. OSHA's construction industry standards already contain a broad requirement for such a program. More specific requirements have been included in our standards for hazardous waste operations. Now, we are seeking information on the program elements that employers and employees have found most effective in preventing illnesses and injuries. We also want to find out how OSHA might best motivate and assist employers in development and implementation of these programs. It has long been our conviction, greatly strengthened by experience with the voluntary protection programs, that steps taken by management to insure that employee protection is incorporated into a company's day by day operations, are of paramount importance in reducing hazards in the workplace. In passing the OSH Act, Congress after all placed primary responsibility for job safety and health on the employers.

We have also sought to expedite the development of standards through a technique known as mediated rulemaking. Historically, the clash of opposing views among interested parties has tended to slow the rulemaking process. With an appropriate candidate for regulation, OSHA can lessen controversy by convening representatives of all the principal groups interested in a particular hazard, and developing consensus on the major issues before announcing the proposed rule.

Most recently we have used this procedure with 4,4 methylenedianiline, known as MDA, and so far, rulemaking on this substance has been relatively trouble-free. We expect to issue a proposed rule for MDA shortly.

Last year, we entered into a new arena of rulemaking. Despite initial concerns that AIDS and hepatitis B were public health issues, we examined the problem of bloodborne infectious disease in the workplace, and concluded that action was necessary to protect health care employees exposed to such diseases in the course of their work.

The **Chairman**. You are not suggesting that OSHA is not a public health agency, though, are you?

Mr. **Pendergrass**. The distinction being, Mr. Chairman, that OSHA is an occupational health agency, whereas infectious disease has been traditionally the role of the public health agencies, a distinction that could be confused, but there is that distinction.

The CHAIRMAN. Well, maybe in terms of definition. But in terms of effectiveness in protecting the worker, you are the ones who Congress has given that responsibility to.

Mr. PENDERGRASS. That is right.

The CHAIRMAN. CDC cannot issue the kinds of regulations and rulemaking that OSHA can issue. The Centers for Disease Control cannot do that, which is the center that deals with the various statistics on something like AIDS.

You are the agency to carry that responsibility through.

Mr. PENDERGRASS. That is right, and we are.

The CHAIRMAN. Well, we will come back to that.

Mr. PENDERGRASS. In discharging our responsibility to protect the health care workers, the Agency has undertaken an extensive information effort in conjunction with the Department of Health and Human Services. We have issued an advance notice of proposed rulemaking for control of exposure to these bloodborne diseases.

On enforcement, let me turn to the subject of compliance, and discuss some of our initiatives in this area. I mentioned at the outset that my goal was to expand OSHA's impact by attempting to assure compliance in a broader spectrum of workplaces.

In the early years of this Administration, OSHA sought to steer away from an enforcement approach that generated too much litigation and not enough abatement of hazards. At the same time, the Agency recognized the need to provide more assistance and encouragement to employers and employees in their efforts to solve workplace problems. Our experience has shown that programs that combine aggressive enforcement with intensive educational and assistance efforts are the most successful.

In the area of enforcement in the past few years, we have tried in three ways to make our inspections count for more: first, by focusing them on the industries and work sites where statistical evidence indicates injuries are the most likely to occur. Second, by improving the quality of each inspection. And third, by enhancing the deterrent impact of OSHA inspections for all employers inspected or not.

In targeting, we have developed, and continue to refine, a system of targeting which concentrates OSHA's compliance efforts on high hazard industries, and high hazard workplaces within those industries.

This targeting system includes:

Scheduling health inspections on the basis of Agency knowledge of health hazards in a particular industry. The system relies in part on records of health violations found on previous OSHA inspections.

Concentrating on the very hazardous construction and maritime sectors, and using local and national emphasis programs to emphasize other industries and operations that pose problems.

And finally, scheduling safety inspections in high hazard industries, and manufacturing sectors, and further concentrating within those high hazard manufacturing industries on establishments which, on the basis of their records of past performance, appear most likely to have serious problems.

To follow up on that, on March the 25th, a new directive was issued to the field staff, requiring a walk-through at every facility, regardless of records of past performance. During the walk-through, the compliance officers will review the employers' overall safety and health management program, and expand the scope of the inspection if there appear to be deficiencies in that program. By conducting this review, OSHA will be better able to assess the overall working conditions in the facility and provide greater worker protection.

We will also conduct random safety inspections in firms in high hazard manufacturing industries, regardless of their individual safety records; and in firms within low hazard manufacturing industries; and finally, in firms in selected industries outside manufacturing in order to ensure that all employers are possible targets of OSHA inspection—that none is exempt.

These targeting policies, particularly the targeting system for safety inspections in the manufacturing sector, are working. The system has taken the agency to the most hazardous establishments. In Fiscal Year 1987, 41 percent of all workplaces visited on unprogrammed inspections, such as investigations of accident or complaints, were found to be in compliance with the OSHA standards, while only 10 percent of those visited on targeted walk-around safety inspections in manufacturing were without violations.

Quality inspections: We have taken steps——

The CHAIRMAN. Just before we leave that, how often each year in the workplaces deemed most hazardous, how often are they inspected each year?

Mr. PENDERGRASS. Mr. Chairman, that depends on a particular industry, what the record is. In the meatpacking industry, we get into those facilities about once every third year on scheduled inspections.

The CHAIRMAN. Well, we will come back to meatpacking. But under the MSHA statute, we require four inspections each year for hazardous workplaces. And you're saying just in the one industry that comes to mind—meatpacking—it is once every three years.

Mr. PENDERGRASS. Yes.

The CHAIRMAN. Is that typical?

Mr. PENDERGRASS. It is probably a little more often than some others.

The CHAIRMAN. More often? These are the most hazardous places that we are talking about?

Mr. PENDERGRASS. Yes. With regard to quality of inspections, we have taken steps to assure quality inspections, both by enhancing the skills and the experience of our compliance officers, through new courses at the OSHA training institute, and by improving inspection procedures.

Since May 25th of 1986, when the Hazard Communication Standard became fully effective in the manufacturing sector, we have inspected for compliance with that standard in all the manufacturing firms that we have visited. To do this effectively, we have had to provide special training for our compliance personnel. The Hazard Communication Standard is unique, in that it offers protection from exposure to all potentially hazardous materials at a worksite. By enforcing this one standard, we have been able to provide protection to all of the workers at the manufacturing sites that we inspect.

In September, 1987, the field staff was instructed to include a review of system safety in inspections. This technique was first used in a special study of the chemical industry following the Bhopal, India incident. It is a technique that improves the quality of inspections by including evaluation of the physical and administrative components of a company's overall safety program.

Multiplier effect: In the past two years, OSHA has used the penalty process to emphasize the seriousness of standards violations, and to multiply the deterrent effect from a single inspection.

In March of 1986, OSHA revised its procedures for calculating proposed penalties for willful or repeat violations; for high gravity serious violations; and for failure to abate previously cited violations. Since then the Agency has proposed high penalties in a number of cases involving particularly egregious violations of safety, health and record-keeping regulations. In at least 12 instances, the penalties proposed have exceeded $500,000, and in two instances, they have ranged as high as $4 to $5 million.

Before the March, 1986, policy change, penalties of this degree were not possible. For example, in the 1978 Willow Island, West Virginia, cooling tower disaster, OSHA proposed a total penalty of $105,000. In the case of the L'Ambiance Plaza collapse in Bridgeport in 1987, OSHA proposed $5.1 million in penalties against the prime contractor and several subcontractors. Through this penalty policy, all employers are learning that work must be made safer, and that close attention to Federal safety and health requirements is essential.

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We have provided assistance to employers and employees. The ordinary way in which we reach out beyond our formal programs is by day-by-day contacts across the country with the public we serve. Our field staff routinely provides technical information in response to phone inquiries, to assist employers and employees in addressing workplace hazards. Regional office personnel and field compliance officers conduct seminars, speak in service clubs, present papers at scientific and technical meetings, teach special courses, hold press conferences, give instructions in vocational schools and colleges.

We also have formal programs that provide assistance in complying with the Act. Because we cannot rely on regulations and inspections alone to provide the answer to occupational safety and health problems, we have emphasized existing programs and developed new ones.

Our voluntary protection programs, on-site consultation services, and new directions grants encourage employers to meet the OSH Act's objectives to maintain safe and healthful workplaces, and to help employees identify workplace hazards and to follow safe work practices.

In the Voluntary Protection Programs, we are pleased to recognize corporations whose safety and health programs represent models to be emulated.

Our Voluntary Protection Programs serve as an exemplary counterpart to our strong enforcement actions. The goal is to encourage and induce American industry to take pride in excellence in safety and health, and to recognize that a fully developed safety and health program is an investment in good management. The most important qualification for acceptance into OSHA's voluntary protection program is a strong safety and health program with active employee involvement, exemplifying management's continued commitment to provide safe and healthful employment.

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The Mobil Chemical Company has received special recognition in VPP. All 24 of its plants and laboratories have been accepted as participants in OSHA's STAR program. This is the highest category of VPP, as the name implies. To be accepted into the STAR program, a participating company must not only have a comprehensive safety and health program, but also, must have injury and illness incident rates which, for three years prior to its entry into the program, have been at or below the national average for its industry. Mobil Chemical's injury and illness rates were 80 percent lower than the national average for the chemical industry when the company's 24th facility was accepted into the OSHA STAR program last July.

Participants in the STAR program are not targeted for routine inspections, but their overall safety and health programs are evaluated by OSHA every three years. OSHA also retains the right to conduct inspections in response to employee complaints, workplace fatalities, or catastrophes. The chemical industry shares the public's concern about safety and health in the industry, and we are pleased to work with the employers in that sector.

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A plating shop in St. Paul, Minnesota, provides an example of what can be accomplished through the consultation program. The shop owner requested a health survey after several workers had complained of headaches and other symptoms. The State consultant who visited the shop found that carbon monoxide was present in the combustion gases escaping from a hot water boiler which had been installed only a year earlier. The consultant recommended installation of new ducts for the water heater, and a ventilation system for the shop. After the repairs were completed, to ensure that workers were no longer being exposed, the owner monitored the carbon monoxide levels in the shop with equipment loaned by the consultant. In a week or so the consultant returned to conduct a training session for shop employees on the hazards of carbon monoxide.

Training and education are central elements of any successful employer occupational safety and health program. We have assisted in the development and use of materials for such programs through our New Directions grants. This is a competitive grants programs to assist employers' associations and labor unions in developing their capabilities to meet the occupational safety and health training needs of the constituencies that they serve.

Under grants provided by OSHA, training materials on occupational safety and health have been developed by industry and trade union groups, and have been used for training more than half a million workers since 1978.

OSHA's Chicago Training Institute, though primarily a training facility for OSHA's compliance staff, also offers instruction to personnel of States and other Federal agencies, and the private sector.

One of the Institute's activities with the multiplier effect is their train-the-trainer outreach program. Under this program, the Institute has trained and certified more than 4,500 private sector persons as basic instructors in construction safety and health since 1971.

We estimate that more than one million employees have received training in safe construction work practices from OSHA certified instructors.

The Agency recently instituted a requirement that all instructors trained under the train-the-trainer program complete a free refresher course every three years to maintain their credentials.

The State "Plans": There are a number of States which have opted to run their own Federally approved job safety and health programs. They constitute one of our most valuable resources in achieving the goals of the OSH Act. These States maintain inspection forces, and operate safety and health programs that are required to be at least as effective as the Federal program. Twenty States and two jurisdictions now conduct comprehensive occupational safety and health programs. Two other States, Connecticut and New York, operate partial Plans covering only State and local government employees. As you know, these employees are not covered by the Act, except under State Plan authority.

Last year, the Governor of California decided to withdraw the State's OSHA-approved occupational safety and health program. As a consequence, OSHA on July the 1st, 1987, began to exercise concurrent Federal enforcement authority in the State. We drew upon the staff in the Federal program, and temporarily assigned them to California so that coverage for workers under the Act would not be interrupted.

This year we will maintain eight area offices in California. During the initial period of Federal coverage, OSHA will continue to draw upon the staff resources from other areas of the country to assist in conducting inspections. Our goal is to provide effective workplace protection without affecting eventual implementation of the program by California, should that be the outcome of the case pending before the State Supreme Court or of the California ballot initiative this November. We have requested additional resources in the Fiscal 1989 budget to continue meeting our current responsibilities in California.

To date, OSHA has granted final approval to 13 of the State Plans. Final approval marks the formal relinquishment of concurrent Federal jurisdiction. Even after granting final approval, however, OSHA has continuing responsibility under section 18(f) of the Act, to evaluate the manner in which the States administer their Plan.

We monitor the State programs primarily by comparing their performance, as reflected in the inspection data they submit to us, with the Federal experience and other relevant criteria. Periodically, OSHA provides State Plan administrators with evaluation reports that summarize the results of Federal monitoring. These reports are also available to the public upon request.

OSHA's recent evaluations of the State Plans indicate that none is experiencing significant problems in administering its own Plan. All are providing effective worker protection. And the 12 States and one jurisdiction with final approval are operating programs which we judge to be at least as effective as the Federal OSHA program. That does not mean that every State Plan is a mirror image of the Federal program, nor does it suggest that individual States have no need for improvements in selective areas. On the whole, however, the State Plans are contributing significantly to the effective implementation of occupational safety and health programs.

Our present monitoring system is, in our judgment, more efficient and more effective than the system it replaced. The current system was developed largely in response to concerns of the States and of the General Accounting Office which studied OSHA's State Plan monitoring system in January of 1982. The consensus then was that the former hands-on, on-site approach to monitoring was burdensome, intrusive, and duplicative; and moreover, that the monitoring criteria were not objective.

The new system, as noted, relies more on State-submitted information than on a Federal presence, though it allows on-site monitoring when necessary. The data necessary to evaluate State performance are obtained primarily through State participation and OSHA's computerized, integrated, management information system.

We understand that the General Accounting Office, in the study it undertook last year at your request, Mr. Chairman, has recommendations for us on how further to improve the way we monitor the performance of State Plans, and we welcome their suggestions.

Mr.Chairman, I have given the Committee my view of the challenges that we face, and of the steps that we have taken in the past two years to meet those challenges. OSHA is always open to constructive criticism and ideas for change that will help us to do a better job.

We welcome the Committee's views, which are the product of a long and intensive review of the Agency's activities. I can assure you that we will take your suggestions for improvement very seriously indeed.

Finally, I would like to point out that if there had been no OSH Act passed 17 years ago—years that span the administration of four presidents—and if injury rates today were the same as they were then, 15 million additional workers would have been injured, made ill, or killed on the job in the years since 1971.

That this toll did not take place is a testament to the hard work of the dedicated staff of safety and health professionals in and out of government, and to concerned employers and employees, all working for the goal of improved safety and health in the American workplace.

Rest assured that I look forward to working with Congress, labor and industry, in achieving that goal.

At this time, with your permission, sir, Mr. Baroody would like to make a brief statement, and then we will be happy to respond to questions.

[The prepared statement of Mr. Pendergrass and responses to questions submitted by Senators Metzenbaum and Weicker to Mr. Pendergrass, Mr. Baroody, and Mr. White and response of Mr. Pendergrass to additional questions submitted by Senator Kennedy follow:]

STATEMENT OF
JOHN A. PENDERGRASS
ASSISTANT SECRETARY FOR OCCUPATIONAL SAFETY AND HEALTH
BEFORE THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

April 20, 1988

Mr. Chairman and Members of the Committee:

It is a pleasure to appear before the Committee today to testify on the activities of the Occupational Safety and Health Administration (OSHA). I look forward to sharing with you my assessment of our current programs and future prospects.

During my years as a safety and health professional, I have seen many improvements in workplace conditions. Progress in this field has accelerated in the seventeen years since the passage of the Occupational Safety and Health Act (the OSH Act). Occupational injury rates have gone down by more than 25 percent since 1974 and fatality rates by more than 40 percent in that period. In the past two years, we have contributed to this progress in the following ways:

- * The pace of ~~rulemaking~~ [illegible], while slow, is yielding results.
- * The most hazardous workplaces are being inspected.
- * Recalcitrant employers are being dealt with severely.
- * Assistance and encouragement is being provided to those who seek it.

- And, as envisioned by the authors of the OSH Act, OSHA is actively supporting a Federal-State partnership with the States that have chosen to operate federally approved job safety and health programs.

I intend to illustrate these aspects of our programs and policies in my remarks this morning. I will begin by describing briefly the challenges that are basic to OSHA's mission and then go on to outline the policies and program initiatives we have adopted to address those challenges.

The Occupational Safety and Heath Act was adopted in 1970 as an embodiment of the belief that workers are entitled to a safe and healthful occupational environment. The Act establishes a general framework within which this goal may be accomplished. It also provides the agency with a wide range of tools beyond the essential standards-setting and enforcement activities -- tools such as consultative and educational services, training activities, and encouragement of voluntary protection. The Act allows all of these means to be enlisted in our efforts, but leaves to the discretion of the Secretary the best way of ordering those activities to achieve the statutory goal.

When I arrived at OSHA a little less than two years ago, the agency was facing some fundamental challenges, the responses to which were critical to OSHA's future direction and role in the safety and health community. These challenges involved two areas at the very heart of OSHA's mission.

First, in the area of standards-setting, OSHA had to find a means of exercising leadership in the regulation of toxic substances under extremely difficult circumstances. The agency was operating with a set of standards twenty or even thirty years out of date; it was making only fitful progress in issuing a few new standards through a process that had taken five, or ten, or even fifteen years for a single standard; and it had no clear vision of how to break the regulatory log jam.

Our advancing technologies have continued to spawn new hazards, particularly with respect to the chemical environment. At the same time scientific advances in such fields as epidemiology and risk assessment have expanded our knowledge of the adverse health effects of chemical hazards. We have seen that traditional substance-by-substance rulemaking, though necessary in certain cases, is inadequate to the task of providing protection from the large numbers of existing and new chemicals as the risks involved become apparent. Clearly, alternative ways of developing regulations and standards are needed.

Second, in seeking maximum compliance with the Act, OSHA needed to define the proper role of enforcement. The agency had spent half a decade attempting to complement its traditional approaches with a full range of services, such as consultation and training, and voluntary programs designed to encourage safety and health in the workplace. Recognizing the important role such programs and services have in OSHA's mission, and mindful of the constraints within which the agency has always operated, we had to develop enforcement strategies that would have the greatest possible impact on safety and health.

The Act covers nearly 6 million workplaces and some 83 million workers. The resources devoted to implementation of the Act are finite and, inevitably, restrictive; they must be used effectively. Our task is to target most inspections to the most hazardous workplaces. The inspections must be of high quality. They must result in abatement and at the same time serve to deter the presence of hazards in the workplaces OSHA does not reach regularly through inspections. To meet this challenge, we have to devise ways of expanding the impact of our inspection and enforcement efforts and of moving beyond enforcement. Because resources are finite, we need to encourage employers to prevent hazards -- and to hasten abatement voluntarily where hazards do exist -- without the necessity of an OSHA inspection.

I believe that during my tenure OSHA has responded to these challenges. Ours are not the only possible responses and may not in every case be the best ones. But, while our discussion here today may reveal some differences in approach, I am confident that there is a great deal upon which we can agree.

I now would like to review briefly our recent initiatives. Each of OSHA's efforts in the past two years has been directed toward one basic goal -- to broaden the agency's impact and influence on safety and health. Specifically, I have wanted to find ways for OSHA to set broader health and safety standards, and to assure compliance in a broader spectrum of workplaces through new enforcement- and compliance-related initiatives.

RULEMAKING

In the regulatory arena, there have been two discrete tasks -- first, to complete action on several extremely important and in some cases extremely controversial rulemaking projects that had been unresolved for far too long and were diverting far too much of OSHA's time and attention. Second, we needed to develop new approaches to standards-setting in order to assure that OSHA's standards, particularly in the health area, were relevant to today's and tomorrow's workplace.

In almost every case, there was ongoing, seemingly endless litigation with either outstanding court orders or strong expressions of judicial impatience. These matters had to be addressed. There was no way that OSHA could credibly embark along a new regulatory path if it could not first complete work on these few important standards.

We have kept that commitment. Comprehensive standards for field sanitation, benzene, formaldehyde and grain handling have been issued, two of them without resulting judicial challenges. An expanded scope hazard communication standard becomes effective in May. In addition, in the last two years we have adopted a rigorous interim standard for the protection of workers at hazardous waste sites, as well as several other important final rules, including standards for single piece rim wheels (in marine terminals), recordkeeping, electrical standards for construction, and presence-sensing devices for mechanical power presses.

And we have an extremely busy standards promulgation schedule for this year as well.

There is no denying, however, that the rulemaking process is slow. The process itself is designed that way, and with good reason. The public participation process and the economic feasibility analyses required by law and Executive order produce sound regulations, which can withstand the challenges that they invariably face when they are finally issued.

Among the actions that added to OSHA's already rigorous rulemaking requirements were three occurrences in 1980. A U.S. Supreme Court interpretation of the OSH Act in the benzene case (API v. Marshall) imposed new responsibilities for assessment and demonstration of risk, and two statutes enacted that year added new considerations to the growing list of requirements for promulgation and enforcement of occupational safety and health standards. The Regulatory Flexibility Act of 1980 requires that we consider the special needs of small businesses in our rulemaking, and the Paperwork Reduction Act of 1980 requires that we consider and limit, if possible, the burden imposed on the public for collection of information needed to develop and implement the regulations we promulgate.

My recognition of the burdens associated with OSHA standards-setting has led me to look to the second important task of the agency in the rulemaking area -- the need to seek alternative ways to respond to our growing understanding of existing hazards, as well as to potential hazards from new processes and new substances. I did not have to look very far to find a model for this endeavor. OSHA's Hazard Communication Standard, first issued in 1983, provided an unparalleled base from which to build a comprehensive regulatory framework of protection for America's workers in manufacturing. Beginning in May of this year, when the standard goes into effect for all non-mining industry sectors, workers will be assured of receiving critical information and training concerning the thousands of potentially hazardous substances in the workplace. This landmark standard is a generic rule in the truest sense -- it is applicable to the broadest possible spectrum of chemical hazards. Moreover, it is dynamic in nature; as new chemicals are introduced into the workplace and new information about existing chemicals becomes available, the producers must update the information they provide their customers, and employers must update their hazard communication programs to reflect these new developments and to provide their employees with the vital information they need to protect themselves.

While the hazard communication standard is perhaps OSHA's most celebrated achievement, it is not enough. OSHA must provide additional protection against the most hazardous chemical substances.

At present, this protection takes the form of a list of exposure limits for over 400 air contaminants, supplemented by 24 more comprehensive standards for selected substances. The threshold limit values, which were recommended in 1968 by the

American Conference of Governmental Industrial Hygienists for the 400 air contaminants, were adopted *en masse* as permissible exposure limits (PELs) by OSHA in 1971, under the provisions of section 6(a) of the OSH Act. For two years after the effective date of that Act, section 6(a) allowed OSHA to promulgate as an occupational safety or health standard any national consensus standard, without having to go through the rigorous rulemaking procedures established in section 6(b) of the Act. In the fifteen years that followed, the agency has succeeded in issuing comprehensive standards for only 24 additional substances.

Unfortunately, OSHA's traditional substance-by-substance approach to updating and upgrading the basic list of exposure limits has resulted in the agency's falling further and further behind in its quest to provide full protection to America's workers. Many of the PELs were adopted on the basis of information that is now twenty to thirty years out of date.

In order to begin to remedy this unacceptable situation, OSHA is working to update at one time -- through the 6(b) rulemaking process with all its requirements for public participation -- those of the 400 exposure limits adopted at the agency's inception which need revision and to add exposure limits for 200 other substances. This "PEL Project," which OSHA will complete this fall, will be as significant a step in worker protection as the hazard communication standard and will provide substantially improved protection to millions of workers.

This project in itself, however, does not replace comprehensive regulations for health protection. Nonetheless -- since it is manifestly impossible to develop comprehensive standards for all of the potentially toxic substances that people may encounter at work -- the PEL Project is a critical step. We will be supplementing this effort with other generic steps to protect workers, such as those for respiratory protection, soon to be published as a proposal, as well as actions with respect to medical surveillance and exposure monitoring. In this regard, we will also be examining the effectiveness of medical surveillance and exposure monitoring in existing OSHA standards to see what has worked to best protect workers. OSHA will continue to set comprehensive standards for those substances that warrant specific and detailed consideration.

Looking to the future, we are examining the extent to which employer-established safety and health programs can reduce accidents and injuries in general industry and in shipyard and longshoring employment. OSHA's construction industry standards already contain a general requirement for such programs, and more specific requirements have been included in our standards for hazardous waste operations. Now, we are seeking information on the program elements that employers and employees have found most effective in preventing injuries and illnesses. We also want to find out how OSHA might best motivate and assist employers in the development and implementation of these programs. It has long been our conviction -- greatly strengthened by our experiences in the Voluntary Protection Programs -- that the steps taken by management to ensure that employee protection is incorporated into a company's day-to-day operations are of paramount importance in reducing hazards in the workplace. In passing the OSH Act, Congress after all, placed primary responsibility for job safety and health on employers.

We have also sought to expedite the development of standards through a technique known as mediated rulemaking. Historically, the clash of opposing views among interested parties has tended to slow the rulemaking process. With an appropriate candidate for regulation, OSHA can lessen controversy by convening representatives of all the principal groups interested in a particular hazard and developing consensus on the major issues before announcing the proposed rule. Most recently, we used this procedure with 4,4 methylenedianiline (MDA), and, so far, rulemaking on this substance has been relatively trouble-free. We expect to issue a proposed rule for MDA shortly.

Last year we entered into a new arena in rulemaking. Despite initial concerns that AIDs and Hepatitis B were public health issues, we examined the problem of bloodborne infectious diseases in the workplace and concluded that action was needed to protect health-care employees exposed to such diseases in the course of their work. Therefore, the agency has:

- undertaken an extensive information effort in conjunction with the Department of Health and Human Services, and
- issued an Advance Notice of Proposed Rulemaking for control of exposure to these bloodborne diseases.

ENFORCEMENT

Let me turn to the subject of compliance and discuss some of our initiatives in this area. I mentioned at the outset that my goal was to expand OSHA's impact by attempting to assure compliance in a broader spectrum of workplaces. In the early years of this Administration, OSHA sought to steer away from an enforcement approach that generated too much litigation and not enough abatement of hazards. At the same time, the agency recognized the need to provide more assistance and encouragement to employers and employees in their efforts to solve workplace problems. Our experience has shown that programs which combine aggressive enforcement with intensive educational and assistance efforts are the most successful.

In the area of enforcement in the past few years, we have tried in three ways to make inspections count for more:

First, by focusing them on the industries and worksites where statistical evidence indicates injuries are most likely to occur;

Second, by improving the quality of each inspection; and

Third, by enhancing the deterrent impact of OSHA inspections for all employers, inspected or not.

(1) Targeting: We have developed -- and continue to refine -- a system of targeting which concentrates OSHA's compliance efforts on high-hazard industries and high-hazard workplaces within those industries. This targeting system includes:

* scheduling health inspections on the basis of agency knowledge of health hazards in a particular industry. The system relies in part on records of health violations found on previous OSHA inspections;
* concentrating on the very hazardous construction and maritime sectors;
* using local and national emphasis programs to emphasize other industries or operations that pose problems;
* scheduling safety inspection in high-hazard industries in the manufacturing sector and further concentrating within those high-hazard manufacturing industries on establishments which, on the basis of their records of past performance, appear most likely to have serious problems.
    * On March 25, a new directive was issued to field staff requiring a walk-through at every facility regardless of the records of past performance; during the walk-through, the compliance officer will review the employer's overall safety and health management program and expand the scope of the inspection if there appear to be deficiencies in that program. By conducting this review, OSHA

will be better able to assess the overall working conditions in the facility and provide greater worker protection.

* And finally, conducting random safety inspections: (a) in firms in high-hazard manufacturing industries regardless of their individual safety records, (b) in firms in low-hazard manufacturing industries, and (c) in firms in selected industries outside manufacturing, in order to ensure that all employers are possible targets of an OSHA-initiated inspection -- that none is exempt.

These targeting policies, particularly the targeting system for safety inspections in the manufacturing sector, are working. The system is taking the agency to the most hazardous establishments. In FY 1987, 41 percent of all workplaces visited on unprogrammed inspections (such as investigations of accidents or complaints), were found to be in compliance with OSHA standards, while only 10 percent of those visited on targeted walk-around safety inspections in the manufacturing sector were without violations.

(2) Quality Inspections: We have taken steps to ensure quality inspections, both by enhancing the skills and experience of our compliance officers through new courses at the OSHA Training Institute and by improving inspection procedures. Since May 25, 1986, when the Hazard Communication Standard became fully effective in the manufacturing sector, we have inspected for compliance with that standard in all the

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ASSISTANCE TO EMPLOYERS AND EMPLOYEES:

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A plating shop in St. Paul, Minnesota, provides an example of what can be accomplished through the consultation program. The shop owner requested a health survey after several workers complained of headaches and other symptoms. The state consultant who visited the shop found that carbon monoxide was present in combustion gases escaping from a hot-water boiler, which had been installed only a year earlier. The consultant recommended installation of new ducts for the water heater and a ventilation system for the shop. After the repairs were completed, to assure that workers were no longer being exposed, the owner monitored the carbon monoxide levels in the shop with equipment loaned by the consultant. In a week or so, the consultant returned to conduct a training session for shop employees in the hazards of carbon monoxide.

Training and Education: Training and education are essential elements of any successful employer occupational safety and health program. We have assisted in the development and use of materials for such programs through our New Directions grants. This is a competitive grants program to assist employer associations and labor unions in developing their own capabilities to meet the occupational safety and health training needs of the constituencies they serve. Under grants provided by OSHA, training materials on occupational safety and health have been developed by industry and trade union groups, and have been used to train more than half a million workers since 1978.

OSHA's Chicago Training Institute, though primarily a training facility for OSHA's compliance staff, also offers instruction to personnel of State and other Federal agencies and the private sector. One of the Institute's activities with a multiplier effect is a train-the-trainer outreach program. Under this program, the Institute has trained and certified more than 4,500 private sector persons as basic instructors in construction safety and health since 1971. We estimate that more than one million employees have received training in safe construction work practices from OSHA-certified instructors. The agency recently instituted a requirement that all instructors trained under the train-the-trainer program complete a free refresher course every three years to maintain their credentials.

STATE PLAN:

The States which have opted to run their own federally-approved job safety and health programs, or "Plans," constitute one of our most valuable resources in achieving the goals of the OSH Act. These States maintain inspection forces and operate safety and health programs that are required to be at least as effective as the Federal program.

Twenty States and two jurisdictions now conduct comprehensive occupational safety and health programs. Two other States -- Connecticut and New York -- operate partial plans covering only State and local government employees (who are not covered by the Act except under State Plan authority).

Last year, the Governor of California decided to withdraw the State's OSHA-approved occupational safety and health program. As a consequence, OSHA, on July 1, 1987, began to exercise concurrent Federal enforcement authority in the state. We drew upon staff from the Federal program and temporarily assigned them to California so that coverage for workers under the Act would not be interrupted. This year we will maintain eight area offices in California. During the initial period of Federal coverage, OSHA will continue to draw upon staff resources from other areas of the country to assist in conducting inspections. Our goal is to provide effective workplace protection, without affecting eventual implementation of the program by California, should that be the outcome of the case pending before the State Supreme Court or of the California ballot initiative this November. We have requested additional resources in the FY89 budget to continue meeting our current responsibilities in California.

To date, OSHA has granted final approval to thirteen of the State Plans. Final approval marks the formal relinquishment of concurrent federal jurisdiction. Even after the granting of final approval, however, OSHA has continuing responsibility under section 18(f) of the OSH Act to evaluate the manner in which the States administer their Plans.

We monitor the State programs primarily by comparing their performance, as reflected in the inspection data they submit to us, with the Federal experience or other relevant criteria. Periodically, OSHA provides State Plan administrators with evaluation reports that summarize the results of Federal monitoring. These reports are also available to the public upon request.

OSHA's recent evaluations of the State Plans indicate that none is experiencing significant problems in administering its Plan. All are providing effective worker protection, and the twelve States and one jurisdiction with final approval are operating programs which we judge to be at least as effective as the Federal OSHA program. That does not mean that every State Plan is a mirror image of the Federal program. Nor does it suggest that individual States have no need for improvements in selected areas. On the whole, however, the State Plans are contributing significantly to the effective implementation of occupational safety and health programs.

Our present monitoring system is, in our judgment, more efficient and more objective than the system it replaced. The current system was developed largely in response to concerns of the States and of the General Accounting Office, which studied OSHA's State Plan monitoring system in January 1982. The consensus was that the former hands-on, on site approach to monitoring was burdensome, intrusive and duplicative, and, moreover, that the monitoring criteria were not objective. The new system, as noted, relies more on State-submitted information than on a Federal presence, though it allows onsite monitoring when necessary. The data necessary to evaluate State performance are obtained primarily through State participation in OSHA's computerized Integrated Management Information System.

We understand that the General Accounting Office in the study it undertook last year at the Chairman's request has recommendations for us on how further to improve the way we monitor the performance of the State Plans. We welcome their suggestions.

* * *

Mr. Chairman, I have given the Committee my view of the challenges that we face and of the steps we have taken in the past two years to meet those challenges. OSHA is always open to constructive criticism and ideas for change that will help us do our job better. We welcome the Committee's views, which are the product of a long and intensive review of the agency's activities. I can assure you that we will take your suggestions for improvements very seriously indeed.

Finally, I would like to point out that if there had been no OSH Act passed seventeen years ago -- years that span the administrations of four Presidents -- and if injury rates today were the same as they were then, 15 million additional workers would have been injured, made ill, or killed on the job in the years since 1971. That this toll did not take place is a testament to the hard work of dedicated safety and health professionals in and out of Government, and to concerned employees and employers all working for the goal of improved safety and health in American workplaces.

Rest assured that I look forward to working with Congress, labor and industry in achieving that goal.

That concludes my prepared remarks. I will be happy to respond to questions from the Committee.

Questions to Assistant Secretary Pendergrass submitted by Senator Metzenbaum

1. There was some discussion during your appearance before the Committee on Labor and Human Resources concerning your view that significant OSHA resources are expended defending the agency against "frivolous" litigation. As you will recall, OSHA was sued by interested parties in an effort to require OSHA to promulgate a hazard communication standard in expanded form, to issue an ethylene oxide standard, and to promulgate a field sanitation standard, just to mention a few instances. Do you consider those lawsuits "frivolous" litigation?

2. What "frivolous" lawsuits has OSHA been involved in during the past five years? Please provide the Committee with a list of what you would call "frivolous" lawsuits. For each such lawsuit, please include an accounting of how much time you, Assistant Secretary Baroody, and Deputy Assistant Secretary White have spent on the lawsuits, and an estimate of the dollar amount spent by OSHA on the "frivolous" litigation.

3. The Committee heard testimony from a Texas worker who presented evidence that OSHA is neglecting its duty to enforce the Field Sanitation Standard. In addition, a study in New York (copy attached) shows that of 21 farmworker camps surveyed during the 1987 harvest season, only one of 21 provided water to wash hands, only four of 21 provided toilets, and only 13 of 21 provided drinking water. What is OSHA's response to this evidence of serious non-compliance with the field sanitation standard? Does OSHA have substantial evidence to the contrary? If so, please provide that evidence in detail. What steps, if any, will OSHA take in the next two months to make its enforcement of the Field Sanitation Standard more effective?

FARMWORKER LEGAL SERVICES OF NEW YORK, INC.
SERVICIOS LEGALES PARA LOS TRABAJADORES AGRICOLAS
SERVICE LEGALE POU MOUNE KĀP TRAVAIL LAN FÈRM YO

Manheim Professional Building
52 South Manheim Boulevard
New Paltz, New York 12561
Telephone: (914) 255-1884

February 26, 1988

Hon. Edward M. Kennedy
Chairman, Senate Labor and Human Resources
Dirkson Senate Office Building
Room 428
Washington, D. C. 20510
Attn: Mr. Walter Sheridan

Dear Senator Kennedy:

Our offices, a grantee of the Legal Services Corporation, represent migrant, seasonal and year round farmworkers in a variety of civil matters. We have two offices, one in Rochester, New York and one in New Paltz, New York.

On February 25, 1988, Mr. Walter Sheridan from your office, requested a copy of the results of a survey we conducted during the 1987 harvest season. Also requested was correspondence relating to the survey. The survey encompasses responses from farmworkers at 21 different farms in New York concerning the field sanitations standards. 29 C.F.R. Part 1928.

We chose to conduct the survey for two reasons. First, for years several farmworkers have complained about the lack of facilities in the fields. During the harvest season, which runs from May until November, a major part of our job is to visit migrant and seasonal workers at numerous migrant camps in a total of 14 counties. These visits allow us to meet with the people we represent and to observe the conditions in the camp. Many of our clients have explained their experience with a variety of illnesses due to the lack of these basic facilities. Second, the May, 1987 passage of the field sanitations regulations made the 1987 harvest season a logical time to conduct the survey. It was our intention to learn whether the farmers covered by the regulations were complying with them.

The results of the survey indicate a gross noncompliance with the new regulations. In the 21 camps surveyed Legal Services workers personally asked the farmworkers whether the mandated facilities had been provided. Although the workers, readily spoke to us about the lack of the facilities, many were reluctant to make formal written complaints for fear of losing their jobs. However, we were able to glean the following results.

Drinking Water	Water to Wash Hands	Cups	Toilets
13 of 21 farms provided	1 of 21 farms provided	1 of 21 farms sometimes provided	4 of 21 farms provided

In addition to farmer compliance, we wanted to know what plans OSHA had for enforcing the regulations. Accordingly, meetings were scheduled with the local and regional offices of OSHA both during the season and after results of the survey were compiled. As the correspondence to OSHA officials reflects, there were a number of concerns that arose as a result of the visits. One of the more troubling overall concerns is that violations of the field sanitation regulations are not considered serious and therefore are not a priority for OSHA. Officials from OSHA maintained this disposition even after learning of the survey's results.

The compliance level for the 1987 season was very poor. These results, coupled with the OSHA's apparent unwillingness to take this law seriously, suggest that few farmers will comply with the regulations and many farmworkers will go without these basic facilities. I hope that the information I have provided has been helpful and welcome any opportunity to offer further assistance on this matter.

Respectfully submitted,

Claudia A. Smith

CLAUDIA A. SMITH
Attorney At Law

CAS/fs

County	Number of Workers	H_2O Clean/ Cool	Cups	H_2O For Hands	Toilets
Orange	23	sometimes	no	no	no
	26	yes	no	no	sometimes
	52	no	no	no	no
Ulster	90	yes	no	no	yes
	62	yes	no	no	yes
	50	no	no	no	no
	48	yes	no	no	yes
	21	no	no	no	no
Putnam	63	yes	no	no	yes
Wayne	40	yes	no	no	no
	25	yes	sometimes	no	no
	23	no	no	no	no
	20	no	no	no	no
Orleans	20	yes	no	no	no
	30	yes	no	no	no
	12	no	no	no	no
Oswego	70	yes (not clean or cool)	no	no	no
	70	yes	no	yes	no
	4	yes	no	no	no
	9-10	yes	1 common cup	no	no
	25	no	no	no	no

RESPONSE SHOWS # OF FARMS SURVEYED

County	Number of Workers	H_2O Clean/ cool	Cups	H_2O for Hands	Toilets
Totals					
Orange	101	1 yes 1 no 1 sometimes	3 no	3 no	2 no 1 sometimes
Ulster	281	3 yes 2 no	5 no	5 no	3 yes 2 no
Putnam	63	1 yes	1 no	1 no	1 yes
Wayne	108	2 yes 2 no	3 no 1 sometimes	4 no	4 no
Orleans	62	2 yes 1 no	3 no	3 no	3 no
Oswego	179	4 yes 1 no	4 no	4 no 1 yes	5 no

ENCLOSURE

OSHA RESPONSES TO FOLLOW-UP QUESTIONS SUBMITTED TO MR. PENDERGRASS

A. Questions submitted by Senator Metzenbaum

1. There was some discussion during your appearance before the Committee on Labor and Human Resources concerning your view that significant OSHA resources are expended defending the agency against "frivolous" litigation. As you will recall, OSHA was sued by interested parties in an effort to require OSHA to promulgate a hazard communication standard in expanded form, to issue an ethylene oxide standard, and to promulgate a field sanitation standard, just to mention a few instances. Do you consider those lawsuits "frivolous" litigation?

2. What "frivolous" lawsuits has OSHA been involved in during the past five years? Please provide the Committee with a list of what you would call "frivolous" lawsuits. For each such lawsuit, please include an accounting of how much time you, Assistant Secretary Baroody, and Deputy Assistant Secretary White have spent on the lawsuits, and an estimate of the dollar amount spent by OSHA on the "frivolous" litigation.

Combined response to Questions 1 and 2:

It is not my view that "significant OSHA resources are expended defending the agency against 'frivolous' litigation," and I did not intend to convey that to the Committee. I would certainly not characterize either the ethylene oxide or field sanitation litigation as frivolous.

As I stated repeatedly during my testimony, the ability to file court actions and to petition the government are important rights that should not be curtailed. My point was simply that OSHA's control over its own rulemaking agenda has been weakened somewhat by court orders requiring that certain regulatory projects be completed within specified time limits. We recognize that the lawsuits resulting in these orders were filed because of the petitioners' sincere concerns. It is not OSHA's or the Department's position that this type of litigation is frivolous.

A. Questions submitted by Senator Metzenbaum

Combined Response to Questions 1 and 2: (continued)

Addressing another type of litigation, Assistant Secretary Baroody and I stated our belief that it would be desirable to reduce the contentious atmosphere which historically has surrounded the development of OSHA standards through means such as negotiated rulemaking and perhaps thereby lessen the likelihood of challenges to a standard after it is issued.

3. The Committee heard testimony from a worker who presented evidence that OSHA is neglecting its duty to enforce the Field Sanitation Standard. Does OSHA have evidence to the contrary? What steps, if any, is OSHA considering to make its enforcement of the Field Sanitation Standard more responsive?

Response to Question 3:

OSHA is enforcing its field sanitation standard. We have developed and implemented a sound inspection strategy to determine employer compliance with the standard. Detailed compliance guidelines for implementing the standard were issued to our field staff in July 1987 (copy attached).

The field sanitation standard became fully effective on July 30, 1987. The goals for scheduled visits to agricultural operations to inspect for compliance with the field sanitation standard for the remaining two months of FY 1987 and for FY 1988 are related to the number of employees covered by the standard; that is, the number of workers covered by the field sanitation standard as a percentage of workers in all industries is roughly equal to the number of planned field sanitation inspections as a percentage of total inspections.

A. Questions submitted by Senator Metzenbaum

Response to Question 3: (continued)

In the two months in FY 1987 in which the field sanitation standard was in effect, Federal OSHA conducted 300 scheduled inspections to determine compliance with the standard. This figure far exceeded the goal of 166 inspections for that period.

For FY 1988, OSHA's goal is to conduct 675 programmed Federal inspections covering field sanitation. As of March 31, 1988, 132 inspections had been conducted, with the peak harvest season yet to come.

During the first six months in which the standard was in effect (from August 1987 through January 1988), 66 percent of employers inspected were found to be in compliance with the standard.

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

JUL 7 1987

MEMORANDUM FOR: REGIONAL ADMINISTRATORS

FROM: LEO CAREY, DIRECTOR
DIRECTORATE OF FIELD OPERATIONS

SUBJECT: Compliance Guidelines for Implementing the Field Sanitation Standard

This instructional memorandum provides guidelines for the inspection of agricultural establishments covered by the Field Sanitation Standard - 29 CFR 1928.110. In light of the short amount of time remaining in FY 87 and the significant number of hand labor operations conducted as part of the harvesting process, it is imperative that the information contained in this memorandum be disseminated as quickly as possible. Therefore, an instructional memorandum is an efficient vehicle of communication.

Regional Administrators and Area Directors shall ensure that the procedures covered in this memorandum are adhered to during field sanitation inspections.

This memorandum concerns a new Federal program which affects State programs. Each Regional Administrator shall ensure that this change is promptly forwarded to each State designee. Request State designees to acknowledge receipt of this instructional memorandum. This acknowledgment should include a description either of the State's plan to implement the change or of the reasons why the change will not be implemented for that State. State plan States have 6 months to adopt the field sanitation standard. In those states where a standard has not yet been adopted or is not yet in effect, interim Federal enforcement assistance will be provided through response to complaints.

The new Field Sanitation Standard, 29 CFR 1928.110 will be fully effective on July 30, 1987. The enforcement program will be implemented at the agricultural establishments covered by the Field Sanitation Standard once the standard becomes fully effective.

Traditionally, OSHA has applied its compliance resources in the manufacturing, construction and maritime industries and, therefore, has limited experience in the agricultural sector. Most inspection scheduling procedures outlined in the FOM cannot be used in scheduling inspections of applicable agricultural establishments. These operations tend to be seasonal, and are of short duration in most instances.

Since formal training is not planned for this standard, Regional Administrators shall ensure that an adequate number of CSHOs are familiar with the Field Sanitation Standard and this memorandum in order to conduct their programmed number of inspections. The preamble to the standard will be used as one of the training guides and CSHOs will be familiar with its contents.

The preamble contains a full discussion concerning the record upon which the final standard was justified and based, and OSHA's interpretations and intentions about the meaning of the individual requirements of the standard. In order to ensure an adequate understanding of the final standard and encourage consistent enforcement, particular attention shall be given to the following: Scope; Definitions especially agricultural employer agricultural establishment, and hand-labor operations; accessibility of toilet and handwashing facilities; and requirements for employees working less than 3 hours.

All compliance personnel shall be instructed to look for hand-labor operations in the field when they are in rural areas where such operations are expected to be in progress. Each observation of such operations shall be handled in the following manner. The CSHO making the observation shall inspect the operation if the following are noted:

(1) Apparent violations of the Field Sanitation Standard are observed or circumstances would indicate violations to be reasonably probable; and

(2) It appears that the agricultural employer is covered by the standard.

The above inspections shall be considered programmed inspections. A programmed inspection will not be attempted unless both criteria, (1) and (2) are met. If a significant amount of resources was expended during the observation, but no inspection was conducted due to lack of coverage, an OSHA-1 shall be filled out and marked "No Inspection."

All complaints/referrals received concerning the alleged violations of the Field Sanitation Standard shall be handled as described in the FOM, Chapter IX. However, due to the short durations of these operations it is suggested that the Area Office process the complaints/referrals as quickly as possible given the available resources.

If a denial of entry occurs, a warrant will not be sought in every instance. The Area Director will consider factors such as warrant processing time, anticipated duration of the hand-labor field operation, and impact on compliance before processing a warrant application.

In those instances where a denial of entry is the policy of a given employer, a preinspection warrant should be considered by the Area Director. If a denial of entry occurs, a warrant may not be necessary where the violations are in plain view and sufficient data is collected to support the issuance of a citations.

In those States where the 7(c)(1) enforcement program has responsibility for conducting migrant farmworker camp inspections, they shall also perform inspections under the Field Sanitation Standard.

The following guidelines shall be applied when recording Field Sanitation Standard inspections:

> Current instruction for completing the Inspection Report, OSHA-1, as found in the IMIS Manual and the following instruction shall be used:
>
> (1) The OSHA-1, Item 24 shall be marked as appropriate.
>
> (2) The OSHA-1, Item 25 "National Emphasis Program"will be marked and "FIELDSAN" entered in the "specify field" of all field sanitation inspections.

Finally, please note the field sanitation inspections are NOT National Emphasis Program inspections but the above entry is required due to the lack of an additional field under Item 25 at this time.

References.

1. Field Sanitation Standard - 29 CFR 1928.110.
2. OSHA Instruction CPL 2.45A, April 18, 1983, Field Operations Manual (FOM), Chapter IX.
3. OSHA Instruction ADM 1-1.12A, April 1, 1984, the Integrated Management Information System (IMIS) Forms Manual.

QUESTIONS BY SENATOR WEICKER

MR. PENDERGRASS

OSHA HEALTH AND SAFETY STANDARDS

MR. PENDERGRASS, I HAVE LISTENED TO YOUR TESTIMONY WITH GREAT INTEREST. I HAVE ALSO REVIEWED THE TESTIMONY OF UNION OFFICIALS, EXPERTS IN THE FIELD OF HEALTH AND SAFETY STANDARDS, VICTIMS, AND VICTIMS FAMILIES. AS I'M SURE YOU'RE AWARE BY NOW, THEIR TESTIMONY HAS SERIOUSLY CALLED INTO QUESTION THE COMMITMENT OF YOUR AGENCY TO PROTECTING THE HEALTH AND SAFETY OF THE NATION'S WORKERS.

I NOTE THAT SINCE 1981, OSHA HAS ISSUED ONLY SIX NEW STANDARDS FOR SAFETY.

FURTHERMORE, EVEN WHERE THE AGENCY HAS ACTED, STANDARDS FOR SUBSTANCES SUCH AS ETHYLENE OXIDE HAVE FAILED TO PROVIDE ADEQUATE PROTECTION FOR WORKERS, AND IN OTHER INSTANCES, COURTS HAVE DETERMINED THAT THE STANDARDS NEED TO BE STRENGTHENED.

- DO YOU HAVE A LIST OF STANDARDS SLATED FOR DEVELOPMENT AND ISSUANCE?
- HOW DO YOU DETERMINE THAT LIST? COULD YOU PLEASE SUBMIT IT TO US?
- WHAT STANDARDS DO YOU FEEL ARE MOST CRUCIAL FOR OSHA TO DEVELOP?
- DO YOU BELIEVE IT IS APPROPRIATE FOR OMB TO SUBSTITUTE ITS JUDGMENT RELATIVE TO THE CONTENT OF HEALTH AND SAFETY STANDARDS OVER THAT OF THE HEALTH SCIENTISTS IN YOUR AGENCY?

BEFORE THE HEARINGS YESTERDAY WERE YOU AWARE OF THE FRUSTRATION OF YOUR STAFF AT HAVING THEIR EFFORTS TO DEVELOP SCIENTIFICALLY-APPROPRIATE STANDARDS CONTINUALLY THWARTED BY OMB?

MR. PENDERGRASS

OSHA SHUTTING DOWN DANGEROUS OPERATIONS

MR. PENDERGRASS, IT IS MY UNDERSTANDING THAT EVEN IF A WORKER IS INVOLVED IN A DANGEROUS OR LIFE-THREATENING OPERATION, THAT THE INSPECTOR ONSITE DOES NOT HAVE THE AUTHORITY TO SHUT DOWN THE OPERATION, BUT INSTEAD MUST WAIT FOR AN INJUNCTION FROM THE COURTS. THUS DAYS CAN GO BY WHILE THIS HAZARDOUS CONDITION EXISTS, EVEN WHILE LIVES ARE AT STAKE.

- DO YOU BELIEVE THAT THE STATUTE SHOULD BE AMENDED TO GIVE OSHA INSPECTORS THE AUTHORITY TO SHUT DOWN THE WORKSITE IN SITUATIONS WHERE THERE IS IMMINENT DANGER TO THE WORKERS AT THAT SITE?

- IF YOU DISAGREE, WHAT WOULD YOU SUPPORT IN THE WAY OF MODIFICATIONS TO THE STATUTE TO ENHANCE OSHA'S ABILITY TO RESPOND TO IMMINENT DANGER SITUATIONS?

OSHA RESPONSES TO FOLLOW-UP QUESTIONS
SUBMITTED TO MR. PENDERGRASS

B. Other Questions

"OSHA Health and Safety Standards"

Mr. Pendergrass, I have listened to your testimony with great interest. I have also reviewed the testimony of union officials, experts in the field of health and safety standards, victims, and victims' families. As I'm sure you're aware by now, their testimony has seriously called into question the commitment of your agency to protecting the health and safety of the nation's workers.

I note that since 1981 OSHA has issued only six new standards for safety.

Furthermore, even where the agency has acted, standards for substances such as ethylene oxide have failed to provide adequate protection for workers, and in other instances, courts have determined that the standards need to be strengthened.

Do you have a list of standards slated for development and issuance?

How do you determine that list? Could you please submit it to us?

Combined response to the two questions:

Before I respond, I would like to point out that OSHA has issued 16 new safety standards since 1981 -- not six as stated in the question. They are:

Shipyard Consolidation (04/02/82)
Latch-Open Devices (09/07/82)
Diving (11/26/82)
Marine Terminals (1917) (07/05/83)
Single Piece Rim Wheels (1910) (02/08/84)
Shall/Should Revocation (02/16/84)
Electrical Safety in Construction (07/11/86)
Warning Tags (09/19/86)
Revision of Recordkeeping Requirements (1910/1915) (09/29/86)
Hazardous Waste Operations (1910) (Interim Final) (10/16/86)
Single Piece Rim Wheels (1917) (09/25/87)
Recordkeeping (Telecommunications) (09/28/87)
Recordkeeping Requirements (1926) (09/28/87)
Grain Handling Facilities (1910/1917) (12/31/87)
Presence Sensing Device Initiation (1920) (03/14/88)
Safety Testing and Certification (1910) (04/12/88)

B. Other Questions: "OSHA Health and Safety Standards"

Combined response to first two questions: (continued)

Yes, OSHA has lists of safety and health standards slated for development and issuance. Each of the Standards Directorates prepares such lists each month for internal use. To notify the public of OSHA's plans for standards development, a semi-annual Regulatory Agenda and an annual Regulatory Program are published in the Federal Register.

A number of factors influence the contents of the lists prepared by the Standards Directorates. Among those factors are: (1) review of data and information (including the recommendations of NIOSH) to determine the substances and processes that present the greatest risk to the most people in the occupational environment; (2) petitions from outside interest groups to which OSHA must respond; (3) referrals from the Environmental Protection Agency, to which OSHA must respond, of substances for possible regulation by OSHA in accordance with section 9(a) of the Toxic Substances Control Act; (4) court decisions and orders affecting or requiring action on specific hazards; and (5) recommendations and directions of the Congress.

Question:

What standards do you feel are most crucial for OSHA to develop?

Response:

Because of the slow pace of substance-by-substance rulemaking, it is crucial that OSHA develop generic rules that will apply to a broad range of chemical hazards. As noted in my statement

B. Other Questions: "OSHA Health and Safety Standards"

Response: (continued)

to the Committee, our highest priority at present is the "PEL Project" -- the updating at one time of those of the 400 exposure limits adopted at the agency's inception which need revision, as well as the adoption of exposure limits for 200 other substances which are not currently regulated by OSHA. In addition, we need to supplement the PEL Project, which addresses exposure limits, with rules like the one we are developing for respiratory protection (soon to be published as a proposal) and others that are under consideration relating to medical surveillance and exposure monitoring.

Question:

Do you believe it is appropriate for OMB to substitute its judgment relative to the content of health and safety standards over that of the health scientists in your agency?

Response:

OMB has a legitimate role to play in the review of OSHA standards. That role is outlined in Executive Order 12291 of 1981, which requires that OSHA prepare for OMB's review detailed analyses of the regulatory impact of its proposed standards. OMB's role is further delineated in the Paperwork Reduction Act of 1980, under which OSHA is required to consider and limit, if possible, the burden imposed on the public for collection of information needed to develop and implement the regulations it promulgates. OMB is not "substitut[ing]...its judgment relative to the content of health and safety standards

B. Other Questions: "OSHA Health and Safety Standards"

Response: (continued)

over that of...[OSHA's] health scientists" when it questions the methodology used in our regulatory impact analyses, or when it asks about scientific studies we have not referenced, or feasibility issues it believes we have not adequately considered. We are willing to listen and at times to ask for additional public comment at OMB's suggestion if that seems reasonable and does not reduce essential worker protection. When, however, we believe that OMB is in error and that a change it recommends would reduce essential worker protection, we insist on our position, and we prevail.

Question:

Before the hearings yesterday were you aware of the frustration of your staff at having their efforts to develop scientifically appropriate standards continually thwarted by OMB?

Response:

I was not unaware that a number of staff members of the Standards Directorates were frustrated by the slow progress of the various standards on which they were working. I knew as well that some of them felt strongly that OMB review was an unwarranted intrusion into the rulemaking process. That is not to say that I agreed with them, though I understood how they felt. There is no mathematical or scientific formula that can be used to determine the contents of an OSHA standard. Judgments based on considerations of economic and technological feasibility are integral to our rulemaking process. As I have

B. Other Questions: "OSHA Health and Safety Standards"

Response: (continued)

stated, OMB has a legitimate role to play in that process. The statutory requirements that different interests be heard and that the public participate in rulemaking can certainly foster frustration. I recognize this, and so do the OSHA staff scientists who appeared before the Committee, all of whom continue to produce excellent work for the agency.

B. Other Questions (continued)

"OSHA shutting down dangerous operations"

Mr. Pendergrass, it is my understanding that even if a worker is involved in a dangerous or life-threatening operation, that the inspector onsite does not have the authority to shut down the operation, but instead must wait for an injunction from the courts. Thus days can go by while this hazardous condition exists, even while lives are at stake.

Do you believe that the statute should be amended to give OSHA inspectors the authority to shut down the worksite in situations where there is imminent danger to the workers at that site?

If you disagree, what would you support in the way of modifications to the statute to enhance OSHA's ability to respond to imminent danger situations?

Combined response to the two questions:

We believe that OSHA has sufficient authority under section 13(a) of the Occupational Safety and Health Act to address situations that require an immediate response. Under that section of the Act, the agency is required to petition a U.S. District Court before it may prohibit employment under conditions which threaten immediate harm to workers. Under that authority, OSHA has been able on numerous occasions to prevent imminent dangers to workers. The agency has sought court orders only when it was not possible to address a workplace hazard in any other manner.

Generally when OSHA notifies an employer that an employee is in a situation that poses imminent danger, the employer removes the employee from the situation voluntarily. Only in limited instances has it been necessary for the agency to seek a court order. In such instances, OSHA has acted agressively and successfully to prevent harm to employees. Therefore, we believe that no additional authority is needed to order cessation of work.

U.S. Department of Labor

Assistant Secretary for Policy
Washington, D.C. 20210

APR 28 1989

Dear Mr. Powell:

As requested by Mr. Rollins in his letter to me of April 21, enclosed is the corrected transcript of my testimony before the Committee on Labor and Human Resources.

The letter also requested answers to two written questions submitted by Senator Weicker. Both of these questions directly concern OSHA decisions and actions. Therefore, I have taken the liberty of referring them to Assistant Secretary Pendergrass, the head of OSHA, so that they can get the proper response.

Enclosure

Sincerely,

MICHAEL E. BAROODY

Mr. James W. Powell, Editor
Committee on Labor and
  Human Resources
United States Senate
Washington, DC 20510

MR. BAROODY

OSHA RELATIONSHIP WITH NIOSH

SECTION 22 OF THE OCCUPATIONAL SAFETY AND HEALTH ACT AUTHORIZES NIOSH TO "DEVELOP AND ESTABLISH RECOMMENDED OCCUPATIONAL SAFETY AND HEALTH STANDARDS." IN ACCORDANCE WITH THIS MANDATE, I UNDERSTAND NIOSH HAS SUBMITTED TO OSHA MORE THAN 100 "CRITERIA DOCUMENTS" RECOMMENDING HEALTH STANDARDS.

* IN VIEW OF THIS CLEAR MANDATE AND NIOSH'S GOOD FAITH EFFORT TO COOPERATE, WHY HAS OSHA CHOSEN TO IMPLEMENT SO FEW OF NIOSH'S RECOMMENDATIONS FOR STANDARDS?

* WHAT IS OSHA'S PROCEDURE FOR CONSIDERING NIOSH RECOMMENDATIONS FOR HEALTH AND SAFETY STANDARDS?

B. Other Questions (continued)

"OSHA Relationship with NIOSH"

Section 22 of the Occupational Safety and Health Act authorizes NIOSH to "develop and establish recommended occupational safety and health standards." In accordance with this mandate, I understand NIOSH has submitted to OSHA more than 100 "criteria documents" recommending health standards.

In view of this clear mandate and NIOSH's good faith effort to cooperate, why has OSHA chosen to implement so few of NIOSH's recommendations for standards?

Response:

NIOSH criteria documents generally do not contain enough information to support OSHA rulemaking. Among other things, they do not take into consideration technological or economic feasibility. While they are a valuable contribution to the information needed to develop OSHA standards, they do not in themselves constitute sufficient bases for standards.

Moreover, OSHA's standards-setting priorities are subject to compelling influences other than scientific information like that provided in NIOSH criteria documents. Among such influences are petitions from interested parties, court orders, and referrals by EPA under section 9 (a) of the Toxic Substances Control Act.

NIOSH criteria documents are particularly useful for corroboration of scientific and technical data concerning a substance or process during OSHA rulemaking. They provide detailed analyses of all existing evidence against specific hazards. We believe that even without accompanying OSHA standards, NIOSH criteria documents are used by industry, trade unions and governmental agencies and are valuable tools for combating occupational disease and injury.

B. Other Questions: "OSHA Relationship with NIOSH" (continued)

Question:

What is OSHA's procedure for considering NIOSH recommendations for health and safety standards?

Response:

Upon receipt of a NIOSH recommendation, OSHA assigns staff to review the document and evaluate it for purposes of standards promulgation. NIOSH recommendations therefore become part of OSHA's rulemaking record relating to the substance or process being considered.

MR. WHITE

BRIBE OFFERED TO OSHA BY RUST ENGINEERING

MR. WHITE, ON DECEMBER 21, 1987, THE RUST ENGINEERING COMPANY SENT A LETTER BY FRED W. GRAHAM, RUST'S MANAGER FOR SAFETY AND SECURITY TO MR. JOHN J. STRANTON, AREA DIRECTOR FOR OSHA IN HARTFORD, CONNECTICUT. THIS LETTER OUTLINED THE COMPANY'S CONDITIONS FOR ACCEPTING OSHA'S FINES AND MADE THE OFFER TO TESTIFY BEFORE THE HOUSE LABOR AND EDUCATION COMMITTEE. IT IS MY UNDERSTANDING THAT A COPY OF THIS LETTER SAT ON YOUR DESK FOR FOR AT LEAST TWO WEEKS.

- PLEASE TELL ME OF YOUR INVOLVEMENT WITH THIS LETTER. WHY DID YOU NOT PROMPTLY REFER THIS LETTER TO THE JUSTICE DEPARTMENT?

- ARE YOU AWARE OF TITLE 18, U.S. CODE, SEC 201 OF THE CRIMINAL CODE ON BRIBERY OF PUBLIC OFFICIALS, WHICH STIPULATES WHAT YOU ARE TO DO WHEN OFFERED A BRIBE?

OSHA RESPONSES TO FOLLOW-UP QUESTIONS SUBMITTED TO MR. WHITE

"Bribe offered to OSHA by Rust Engineering"

Mr. White, on December 21, 1987, the Rust Engineering Company sent a letter by Fred W. Graham, Rust's Manager for Safety and Security, to Mr. John J. Stanton, Area Director for OSHA in Hartford, Connecticut. This letter outlined the company's conditions for accepting OSHA's fines and made the offer to testify before the House Labor and Education Committee. It is my understanding that a copy of this letter sat on your desk for at least two weeks.

Please tell me of your involvement with this letter. Why did you not promptly refer this letter to the Justice Department?

Are you aware of Title 18, U.S. Code, Section 201 of the Criminal Code on bribery of public officials, which stipulates what you are to do when offered a bribe?

Combined response to the two questions:

A copy of the letter dated December 21, 1987, from Mr. Graham of the Rust Engineering Company was brought to me some time after January 5, 1988, by Mr. Leo Carey, Director of Field Programs. He particularly brought to my attention the request for a "pre-citation settlement," and we agreed that OSHA should not consider such a settlement. As a secondary matter, we agreed that the offer of "pro-OSHA testimony" should be explicitly rejected by the Area Director. I also spoke briefly with John Miles, the Regional Administrator, who assured me that the offer would be explicitly and unequivocally rejected.

It simply did not occur to me at the time of these discussions that the "offer" of favorable testimony contained in the Rust letter might constitute a violation of Federal criminal statutes. Once I received assurances that Rust's overtures were to be firmly rejected, I did not consider the

OSHA RESPONSES TO FOLLOW-UP QUESTIONS SUBMITTED TO MR. WHITE
"Bribe offered to OSHA by Rust Engineering"

Response: (continued)

possibility of further action until the issue was raised in congressional hearings in early February. On February 3, 1988, immediately following these hearings, the matter was referred to the Department's Inspector General for his review.

I am not aware of the provisions of 18 U.S.C. 201 and have never been apprised of the contents of those provisions.

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

AUG 2 1988

The Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of May 19 forwarding a series of questions on issues that you were unable to cover at the Committee's recent oversight hearings on the Occupational Safety and Health Administration (OSHA). My responses are enclosed. I understand they will be included in the hearing record.

If I can provide any further information, please let me know. Thank you for the opportunity to discuss OSHA's programs and policies to protect workers from on-the-job hazards.

Sincerely,

John Pendergrass
Assistant Secretary

Enclosures

Responses to Questions from Senator Kennedy, following the April 20, 1988 Oversight Hearings on OSHA before the Senate Committee on Labor and Human Resources

1. Confined Space Standard

Questions:

"I understand that development of a proposed standard began in 1975. There was testimony at the hearing on April 19 by two widows, Mrs. Snyder and Mrs. Simon, who lost their husbands in a confined space accident in 1985.

"According to notes taken by John Molovich of the Steel Workers Union at a conference between representatives of OSHA and the employer following the accident, a company official said 'if there was a standard they would have followed it.'

"Shortly thereafter, the Steel Workers Union petitioned OSHA to issue a proposed standard, citing the deaths of the two men. The United Auto Workers Union joined in the petition, citing 14 deaths and 45 persons overcome by toxic substances in confined space accidents.

"In a letter responding to the Steel Workers Union, Mr. Barry White said that he expected to publish a proposal in the Spring of 1986. Copies of the above documents are attached.

- It is now the Spring of 1988. Why has a proposed standard still not been published?
- When will a proposed standard be published?
- When will a final standard be published?"

Response:

While OSHA has not had a generic standard for confined spaces on the books, several of the agency's standards currently contain provisions that address confined space hazards, and OSHA has enforced these provisions. Such provisions are found in the standards for welding, for pulp and paper operations, for construction, and for maritime. Where no specific standard applies, OSHA is able to use the General Duty Clause [section 5(a)(1)] of the OSH Act to address confined space hazards.

OSHA has grappled with the problem of addressing confined space hazards in a generic way since 1975, when the agency first issued an Advance Notice of Proposed Rulemaking for confined spaces in July 1975. Like most standards, the confined spaces project has been affected over the years by changes in agency priorities. The 1975 Advance Notice requested information on how best to define a confined space, and what measures should be used to protect workers in such an environment. Proposals were drafted during the next two years, but the cost estimates were very high and no proposals were approved.

Since 1979, OSHA has issued two additional Advance Notices in an effort to gather additional information and now has a proposal nearly ready for publication. It is expected it will be published by the end of this calendar year. The proposal will define which confined spaces are covered and how workers entering those spaces must be protected. The proposal will be cost-effective.

Once the proposal is published, OSHA believes that the public-comment-and-hearing process can be completed in about six months. Assuming that some changes will be made as a result of public input, but that the economic study will not require major modifications, OSHA should be able to publish a final rule within a year of completion of the hearings.

2. Lockout/Tagout Standard

Questions:

"There was also testimony by another widow, Mrs. Paumier, whose husband was killed in an accident which might have been prevented had a Lockout Standard been in effect. According to OSHA's records, 150 deaths a year result from the lack of adequate lockout procedures.

"Mr. James Scully of OSHA's Directorate of Safety Standards testified that development of a proposed standard began in 1977. He also testified that work on the standard halted in 1981 and then resumed two years later after a petition was received from the Allied Industrial Workers Union.

"In July 1986, the President of the Molders International Union wrote a letter to Secretary Brock seeking the publication of a proposed standard.

"You responded to that letter and said you expected a proposal would be published in early 1987. However, the proposed standard was not referred to OMB for approval until May 1987 and remained there until a few days before the oversight hearings began. It was finally published on May 1, 1988.

"In the announcement of the publication, you stated that the employer would be given 'maximum flexibility' in meeting the standard. Dr. Frank Mirer, the Safety and Health Director of the United Auto Workers was quoted in response to your comment stating that the flexibility could make the standard ineffective.

- Why did it take 13 years to issue a proposed standard?

- Why after all that time, does the published proposal give maximum flexibility to the employers?

- When will a final standard be published?"

Response:

The lockout/tagout project, too, has been affected over the years by changes in agency priorities. Since some Assistant Secretaries have given more emphasis than others to developing this particular rule, there have been periods with little or no activity on the regulation.

The lockout/tagout standard is intended to cover a broad spectrum of hazards from a variety of energy sources, including hydraulic, pneumatic, mechanical, and electrical hazards. It has been necessary, therefore, to create a standard with which employers can comply in a wide variety of workplace settings. While flexibility is required since the hazards are so varied, the standard clearly establishes the safety objectives necessary for worker protection and requires the employer to develop a comprehensive lockout/tagout system, and to train his employees in the implementation of that system. Dr. Mirer will have every opportunity to examine the requirements of the proposal to see whether they are too flexible. OSHA encourages employers, in this proposal, to seek innovative means to achieve effective compliance with the standard's requirements and to go beyond those requirements for protecting their employees.

OSHA published the proposed lockout/tagout standard on April 29, 1988. A great number of comments have been received from the public, and the agency will schedule public hearings in September. A final standard could be completed as early as the first quarter of calendar year 1989.

3. Grain Dust Standard

Question:

"The final Grain Dust Standard which was published in December 1987 after 10 years of development was criticized at the hearing as being inadequate by Dr. Frank Mirer, the Director of Safety and Health of the United Auto Workers. In addition, the Food and Allied Service Trades of the AFL-CIO is suing OSHA also claiming that the new standard is inadequate.

"Dennis Herlyn, a farmer, testified at the hearing that he lost a leg in a grain dust explosion in Marion, South Dakota in 1985 in which three persons were killed. There appears to be a serious question as to whether the new standard would have prevented that explosion since the explosion occurred in the basement which was beyond the 35 foot circumference of dust control covered by the standard.

"There have been eight persons killed in two explosions thus far this year in grain dust facilities. Questions have also been raised as to whether the new standard would have prevented these explosions.

- Why, after 10 years of development, including a study by the National Academy of Sciences, did OSHA publish a standard with less stringent requirements than those proposed by the NAS and in an earlier proposal by OSHA itself?"

Response:

OSHA's standard for grain handling facilities includes in its requirements all but one of the recommendations listed in the National Academy of Sciences (NAS) "First Priority Actions" for eliminating grain dust hazards. (The NAS recommendation that was omitted addressed research.) The Academy also prepared lists of recommended second and third priority actions, many of which have been included in the provisions of the OSHA standard. All these recommendations are found in the NAS Report, Prevention of Grain Elevator and Mill Explosions.

OSHA's final standard for grain handling facilities was based on the largest public-comment-and-hearing record for a safety standard in the agency's history. The extensive degree of public involvement in this rulemaking has resulted in a final standard that is fully protective of workers in the grain-handling sector. Some provisions which were in the proposal were changed as a result of public input. Other changes were made to reflect what the agency learned during rulemaking as it gathered data on industry hazards. For example, public hearings and comment revealed that operational differences between mills and grain elevators result in lower, though still significant, risks for employees in mills. OSHA's final rule therefore applies to mills in a somewhat different manner than to grain elevators.

Questions:

"- Do you think the new standard would have prevented the explosion in Marion, South Dakota and the two explosions this year?

"- If you think it would have, please explain your position."

Response:

The new standard, if complied with, would certainly have minimized the consequences of those explosions though I cannot say with certainty that it would have prevented them. Investigations of the two recent explosions in Kentucky and Illinois are still ongoing, and no final investigation report is available at this time. The findings and recommendations of the OSHA team that investigated the explosion which occurred in Marion, South Dakota, on December 10, 1985, indicate strongly that the requirements of the agency's grain-handling standard, if adhered to, could have prevented that disaster.

The standard's strength is that it does not rely on a single approach to prevention of explosions and consequent injuries and death, but provides a range of backup defenses. The rule addresses all the major fire and explosion hazards that are known in this country. It requires employers to provide employees with safety training and instruction in emergency procedures, to establish housekeeping programs to prevent dust accumulations, and to maintain safety controls on specific equipment such as grain dryers and bucket elevators.

After the explosion in South Dakota on December 10, 1985, OSHA's accident investigation team made a number of recommendations to prevent the occurrence of similar incidents in the future. Among other things, the team recommended the establishment of company programs for preventive maintenance, for training employees in safety requirements, and for minimizing dust accumulations throughout the elevator structures. The team also recommended strict compliance with the electrical code requirements for dust locations throughout the facility and the use of motion detectors and heat sensors on new bucket elevator conveyors. Under OSHA's grain handling standard, all of these recommendations are now requirements for grain handling facilities in this country. We believe that this regulation will contribute significantly to the prevention of future accidents and deaths in the grain handling industry.

4. Enforcement of the Hazard Communication Standard

Questions:

"The Monsanto Company plant in Addyston, Ohio, was cited for violations concerning the adequacy of labeling and Material Safety Data Sheets following an inspection in 1985.

"Two days prior to a trial before an Administrative Law Judge scheduled for November 17, 1986, the attorney handling the case for the Regional Solicitor's office was ordered by the National Solicitor's Office to drop one of the citations. This citation involved the failure to identify that formaldehyde was a potential human carcinogen in the labeling of a product.

"Two months earlier the Director of Field Operations had sent a memorandum to all Regional Administrators advising that cancer warning lables for formaldehyde should generally be required under the standard.

"That citation was vacated and the trial went forward on two other citations which were upheld by the Administrative Law Judge. These citations were settled without further litigation in December 1987 in an agreement which vacated one of the remaining citations with a provision for abatement.

"Michael Connors, the Acting Regional Administrator in Chicago wrote a memorandum summarizing these events. In the memo, he indicated that neither the Area Director nor Regional Administrator were consulted about vacating the citation relating to formaldehyde and that both they, and the Regional Solicitor and National Safety Standard's [sic] office were in favor of litigating the remaining citations rather than settling them."

"The National Solicitor's office advised the Committee that the decision to vacate the formaldehyde labeling citation was made by Deputy Assistant Secretary Frank White.

"A memo from Mr. Kloepfer of the Regional Solicitor's office in Cleveland dated July 17, 1987, expressed concern about settlement terms being considered as a result of discussions between Mr. White and Mr. Tom Evans, the Safety and Health Director of the Monsanto Company.

"Mr. Evans advised the Committee that he telephoned Mr. White prior to the order to vacate the formaldehyde labeling citation. Mr. Evans also said he had both telephone and personal contacts with Mr. White concerning the settlement of the remaining citations.

"There were no memoranda in either the investigative or litigation files reviewed by the Committee concerning the contacts between Mr. White and Mr. Evans.

"OSHA's legislative liaison office advised the Committee that no such memorandum existed. There were no memoranda in the files reflecting the decision to vacate the one citation and to settle the others.

- Did Mr. White make the decision to vacate the formaldehyde labeling citation just prior to the November 12, 1986 trial before the Administrative Law Judge?

- Was the decision based in any way on the prior conversation with Mr. Evans?

- Were the Regional Administrator, the Area Director, the Compliance Officer or the Regional Solicitor's office consulted prior to the decision?

- In view of the September 9, 1986 memorandum from the Director of Field Operations to all Regional Administrators advising that cancer warning labels for formaldehyde were required under the Hazard Communication Standard, why was the decision made?

- In view of the fact that the Regional Administrator the Area Director, the Regional Solicitor and the National Health Compliance Office all strongly favored litigating the remaining two citations after they were upheld by the Administrative Law Judge, as reflected in Mr. Connor's memorandum of December, why was the decision made to settle one of the citations?

- Who made the decision?

- Was the decision based in any way on the prior discussion between Mr. White and Mr. Evans?

- Do you think it is good public policy for OSHA to allow a company official such as Mr. Evans to bypass the Regional and Area OSHA officials and the Regional Solicitor and go directly to top agency officials in matters under litigation?"

"- Do you think such procedures tend to undermine the authority, credibility and morale of such officials?

- Do you think that good public policy should require that a written record should be made of such contacts?

- Do you think that good public policy should require that when decisions are made to vacate or settle citations that a written record be made as to who made the decision and the reasons for making them?"

Response:

Following Monsanto's contest of the citation issued in March 1986, the case was forwarded to the Associate Regional Solicitor in Cleveland for litigation. Some time after this, Monsanto's Safety and Health Director, Tom Evans, telephoned Frank White, Deputy Assistant Secretary for OSHA.

During their conversation, Mr. Evans alleged that the citation for failure to include a cancer warning label on a product containing formaldehyde concerned an "old label." Mr. Evans said that the company was about to replace the label with a new one that contained a cancer warning. He also suggested that notwithstanding OSHA's memorandum of September 1986 concerning formaldehyde labeling, the agency was not in the strongest position to demand a cancer warning since it was in the midst of rulemaking to establish a new standard for formaldehyde and had not yet made a final regulatory determination about the carcinogenicity of formaldehyde. Mr. White indicated only that the issues Mr. Evans raised would be reviewed by staff of OSHA's National Office. That statement was fully consistent with the level of oversight being given by the National Office to litigation under the Hazard Communication Standard (HCS). The National Office placed a great deal of importance on this standard of unprecedented breadth and was anxious to establish favorable precedent in enforcing the rule.

At a subsequent meeting with career attorneys in the Occupational Safety and Health (OSH) Division of the Solicitor's office of the Department of Labor (DOL), Mr. White discussed his conversation with Mr. Evans. The OSH division attorneys reported that the DOL Solicitor's office in Cleveland had told them that Mr. Evans was representing Mr. White as seeming to be agreeable to his views. Mr. White responded that contrary to Mr. Evans' apparent suggestion, he had given no assurances whatever on this matter. The OSH division attorneys advised Mr. White of their concern that litigation decisions on the Hazard Communication Standard should be made carefully to assure that the cases pursued were as strong as possible in order to secure favorable precedent. The creation of bad legal precedent at the outset would impede OSHA's long-term efforts to enforce the standard. Mr. White indicated full agreement with those concerns and asked that the matter be reviewed thoroughly.

Following this meeting, numerous discussions took place between attorneys of DOL's National and Regional Offices, between staff of OSHA's National and Regional offices, and between National Office DOL attorneys and OSHA staff. Mr. White received several briefings on the matter. Career DOL attorneys continued to express the view that the performance language of the HCS posed difficult questions of interpretation and that the initial cases involving labeling violations would be easier to litigate if they involved substances that were less controversial than formaldehyde (the carcinogenicity of which was at issue in rulemaking). The attorneys also pointed out that in the event that the Occupational Safety and Health Review Commission ruled against the agency, the Sixth Circuit might not be the best possible forum in which to pursue an appeal.

As the date for a hearing on Monsanto's contest approached, DOL attorneys pressed Mr. White for a decision. After being fully apprised of the desire of Regional OSHA officials and DOL attorneys to proceed with litigation, Mr. White accepted the recommendation of senior National Office OSHA officials and DOL attorneys. He understood that this was the first HCS labeling case to go to litigation and that although the Regional Solicitor's Office wanted to litigate the case, the National Office OSH Division attorneys believed that the case had some serious potential weaknesses and was clearly not the best first case to take to the Review Commission to test the labeling provisions of the HCS. Mr. White concurred in that opinion and directed that the citation be vacated, with the understanding that in the future, Monsanto's labels would contain a cancer warning, thus achieving prospectve abatement of the cited condition. The decision to withdraw the labeling item was immediately communicated to the Regional attorney handling the case.

In sum, the conversation between Mr. White and Mr. Evans had no bearing on the decision which was eventually made. Even without the phone conversation, the National DOL Solicitor's Office would in due course have become aware of the case, of the difficulties it presented as a litigation vehicle, of the division of opinion within OSHA as to proper litigation strategy, and of the then-existing uncertainties regarding the formaldehyde rulemaking. Under those circumstances, the matter would almost certainly have been elevated to Mr. White for decision in any event.

After OSHA successfully litigated the remaining two items before an Administrative Law Judge (ALJ) of the Review Commission, Monsanto sought and obtained review by the full Commission. During the briefing stage of the proceeding, Monsanto's attorney contacted the National Solicitor's Office concerning a possible settlement of the citation on styrene monomer. The Monsanto attorney represented that the company had developed a new label for styrene which included the target-organ warning, "irritation to the respiratory tract." The DOL attorney handling the case responded that he would inform OSHA of the company's desire to reach settlement, but that he was relatively certain that the agency would insist that the styrene label include the warning, "central nervous system depression." This was in fact Mr. White's settlement position when the proposal was conveyed to him. Discussion with the Regional attorneys reflected a similar belief that the target-organ warning proposed by the company was insufficient.

The agency's counter proposal was conveyed to Monsanto, and a tentative agreement was reached that the company would include the warning sought by OSHA and would comply with the terms of the HCS as stated in the citation in exchange for OSHA's withdrawal of the citation. Mr. White was advised of this proposal and gave his consent in order to achieve immediate abatement as well as to avoid the risk of a reversal of the ALJ's decision by the Review Commission. As with the decision on the formaldehyde labeling issue, Mr. White's conversation with Mr. Evans, which had taken place much earlier, had no bearing on the decision regarding styrene labeling. That decision was based on the recommendation of the career attorneys that a favorable settlement had been reached and should be accepted. Mr. White was advised that the settlement was consistent with the wishes of both Monsanto employee representatives and OSHA regional officials.

OSHA's clearly established practice and procedure is to encourage Regional matters to be handled at the Regional level and to discourage affected parties from contacting National Office officials before all avenues at the Regional level have been exhausted. The agency's written policies specify that once a notice of contest has been filed, OSHA officials are not to participate in conferences with a cited employer without clearance from the appropriate Regional Solicitor. Thus, when Mr. White or other top agency officials are approached, as sometimes happens, by representatives of industry, labor or other interests regarding specific enforcement actions, it is understood that the agency official will not engage in substantive discussion of the issues and will certainly not make any decisions on the case. Instead, the official will direct the petitioner to the normal channels of legal negotiations and, when necessary, instruct the appropriate agency staff to assemble relevant data and develop recommendations. Agency field staff are also expected to contribute to such recommendations. In the Monsanto case, there were differences of opinion expressed among OSHA staff and DOL attorneys, and Mr. White, as the official responsible for making the decision, took those differences into consideration.

As a general matter, the value of a written record of post-contest contacts between agency and company officials is chiefly to ensure that any Department attorney handling the case is aware of relevant statements that have been made. In the Monsanto case, the Solicitor's Office in Cleveland was advised by the National Solicitor's office, after discussion with Mr. White, of the substance of Mr. White's conversation with Mr. Evans. After a notice of contest has been filed, the case file is in the custody of DOL attorneys, who will include in their legal file any information deemed necessary. A written record of the White/Evans conversation was apparently not believed to be essential. Similar considerations apply to the creation of a written record of the reasons for a decision to withdraw or settle a case and of the persons involved in making such decisions. This information would be for use primarily by the Department since deliberative information of this nature is customarily withheld by agencies even when the remainder of the file is publicly released as, for example, under the Freedom of Information Act. Because there are relatively few times when the existence of a written record has proven to be indispensable to the Department's understanding of an action taken months or years earlier, there have been no strict policies set by either OSHA or the Solicitor's Office on the need to create a written record.

5. The Scott Paper Company Settlement

Questions:

"As a result of a recordkeeping and safety inspection of the Scott Paper Company plant in Winslow, Maine, in the spring and summer of 1987, citations for recordkeeping violations were issued on September 25, 1987 with recommended penalties of $813,000. Citations for safety violations with recommended penalties of $525,500 were prepared for issuance on the same date but were not issued.

- Who made the decision not to issue the citations for the safety violations?
- How and when was that decision conveyed to the area OSHA office?
- Why did OSHA decide not to issue the citations for safety violations?
- Were the Regional Administrator, the Area Director, or the Compliance officers consulted prior to that decision?

"Mr. Lee Pelletier, the President of Local 991 of the United Paper Workers International Union Advised the Committee that he hand delivered a written request to the OSHA area office for party status in settlement negotiations. Mr. Pelletier said that in response to a message left at his home on the evening of November 30, 1987, he called the Department of Labor in Washington. He said an official of the Scott Paper Company answered the telephone and told him a settlement had been reached and that he had been called because he requested party status. He said Jerry Solomon of the Solicitor's office then got on the phone, put the call on a speaker and proceeded to read the settlement agreement.

"A settlement agreement was signed by the Solicitor of the Department of Labor and the General Counsel of Scott Paper Company on December 1, 1987, providing for the payment by the company of $475,000 covering both recordkeeping and safety citations."

"The issuance date on the citations for safety violations was changed from September 25, 1987 to December 1, 1987. The recommended penalties totaling $525,500 were deleted.

"A press release by the Department of Labor on December 4, 1987, covering the settlement mentioned the original penalty of $813,000 for record keeping violations and the settlement for $475,000 covering both record keeping and safety violation. It made no mention of the proposed penalties of $525,000 for the safety violations.

- Who participated in the settlement negotiations conducted at the Department of Labor on November 30, 1987?

- Had previous similar meetings been held?

- Did the Regional Administrator, the Area Director or the Area Compliance Officers participate in these negotiations or were they consulted?

- Do you think the eleventh hour telephone conversation with Mr. Pelletier constituted proper party status participation in the settlement?

- Was the settlement of the citations for safety violations which had not yet been issued in accordance with OSHA settlement procedures?

- How were the instructions conveyed to the area office to change the issuance date of the citations and delete the penalties?

- There were 92 serious citations for safety violations. Does not the Occupational Safety and Health Act require that penalties be assessed for each serious citation?

- Do you think the press release was deceptive in not mentioning the proposed $525,000 in penalties for safety violations, or a total of $1,338,500 in proposed penalties?

- Do you think that a closed door, eleventh hour high level settlement without the participation of union and OSHA field officials is good public policy?

- Do you think it tends to undermine the credibility, authority and morale of OSHA field officials?"

Response:

As noted in the question, OSHA issued citations to the Scott Paper Company on September 25, 1987, for violations of the agency's recordkeeping requirements. The citations for safety violations were not issued at that time because they had not yet been approved by the Assistant Secretary for OSHA and the

DOL Solicitor. In cases considered to be potentially of an egregious nature -- that is, in cases with a substantial number of instances of serious and willful violations that carry enhanced penalties, OSHA Area Offices do not have the authority to issue citations on their own initiative, as they do generally. Agency procedures require the approval of the Assistant Secretary for Occupational Safety and Health and of the Solicitor of Labor for issuance of citations and penalties in "egregious cases."

Egregious cases involve important policy, administrative and legal issues. These issues are reviewed by officials in OSHA and in the Office of the DOL Solicitor at both the regional and national office levels. In some cases, representatives of the office of the Secretary of Labor also participate. The objective is to ensure the most thorough investigation and careful preparation possible of citations, proposed penalties, and prosecution of any litigation that may ensue. At the conclusion of the review process, the Area Office is informed whether or not issuance of the citation as an "egregious case"-- that is, with substantially enhanced penalties -- has been approved and, if so, the amount of any proposed penalty.

In the Scott Paper case, the review process had been completed for the recordkeeping citations, which had been authorized for issuance along with a proposed penalty of $813,000. The review process for the safety citations, however, had not been completed, and they were not authorized for issuance. This information was conveyed by telephone to the Area Office on September 25, 1987. The office was told that further instruction would be forthcoming regarding the safety citations.

After the recordkeeping citations were issued and Scott had elected to contest, formal settlement discussions took place on a number of occasions in the next two months at the regional level. Those negotiations included some discussion of the impending safety citations, which Scott Paper officials knew to be imminent, but no real progress was made in resolving the cases.

Approximately ten days prior to the anticipated issuance date for the safety citations, the Scott Paper Company's general counsel contacted the Solicitor of Labor and requested the opportunity to meet in Washington to discuss the settlement of both cases. The intervening Thanksgiving holiday week, as well as various scheduling conflicts, prevented this meeting from taking place until November 30. On that day attorneys for the parties met to discuss terms of a settlement. Representing the company were Scott Paper's General Counsel, Norman Heisman, and Nancy Sowa, attorney. Representing the Department were Solicitor of Labor George Salem, Deputy Solicitor Jerry Thorn, and Jerold Solomon, Sue Ann Wolff, and Kenneth Hellman, attorneys. Mr. Lee Pelletier, President of Local 911, was consulted by telephone as Department officials had been unable to reach him or members of his union in the previous week to notify them of the meeting.

These negotiations resulted in a successful settlement of the recordkeeping case and provided the basis for the ultimately successful resolution of the safety case. The Department has recently concluded the final terms of that agreement with the full participation and concurrence of all four unions at the plant. (A copy of the agreement is appended to this response.)

The agreement with Scott Paper in the settlement of these cases represents a major achievement in enforcement of the Occupational Safety and Health Act. First of all, the agreement achieved a final, corporate-wide resolution of one of OSHA's major recordkeeping cases -- an outcome which has contributed to the success of the agency's recordkeeping compliance program. Second, the agreement laid an effective foundation for efficient disposition of numerous safety violations without the necessity of complex and lengthy litigation. At the same time, Local 911 retained the statutory right to participate in the abatement aspects of the citation; nothing in the settlement agreement impinged upon that right. Finally, the $475,000 penalty paid by Scott Paper represented the third largest penalty yet paid under the OSH Act and reflected the importance we have placed on the penalty mechanism in our enforcement strategy.

The timing and terms of settlements, as well as the negotiation process itself, may vary according to the particular circumstances of each case. It is always OSHA's policy to settle cases amicably if at all possible, and to resort to formal contest procedures only if informal negotiations fail. More than 95 percent of all OSHA cases are now settled without the filing of a notice of contest. This is highly desirable since lengthy litigation only delays the abatement of hazards while diverting staff resources from other, more productive enforcement efforts. It is particularly desirable in the largest cases, like Scott Paper, where the resultant corporate-wide abatement and speedy correction of violations serve as an example for other establishments.

6. The Numbers Game

"Miss Vallon, an industrial hygienist and Mr. Sarnacki, a safety inspector from the Irving Area Office along with Dr. Barry, an industrial hygienist from the Philadelphia Regional ofice testified on April 19, 1988, about what they called the numbers game. They said that OSHA compliance officers were under constant pressure to produce quantity at the expense of quality in conducting inspections. Miss Vallon testified that in the pursuit of numbers she and other industrial hygienists were instructed to accompany safety inspectors to construction sites in order to double the numbers of inspections. Mr. Sarnacki testified that he and others were instructed to go to a construction site and obtain enough information to complete the OSHA-1 form and to conduct the inspection at a later date.

"On the following day you testified that such practices were not in accordance with OSHA policy and an investigation would be conducted concerning them."

"The attached documents indicate that other OSHA offices in Texas may have been adversely effected by the pressure for numbers of inspections.

"Dr. Barry testified that there were quotas that compliance officers were expected to meet. He also testified that he was present last year at a management meeting in Lancaster, Pennsylvania at which the difficulties resulting from the pressure for numbers was brought to your attention.

- Are quotas assigned to Regional or Area offices as Dr. Barry stated in his testimony?

- Does not the pressure for quantity result in less quality of inspections as all three compliance officers stated?

- Does not the practice of using large construction sites to obtain greater numbers of inspections result in inflated OSHA statistics relative to numbers of inspections and in particular to the numbers of construction industry inspections?

- Is there any evidence that these practices are not common to other or all area offices?

- What is the status and results to date of the investigation of the inspection practices in the Irving Area office?

- Do OSHA Supervisors, Area Directors or Regional Administrators receive annual or periodic bonuses?

- If so, are the numbers of inspections and/or citations they produce a factor in determining whether such bonuses are awarded?"

Response:

Inspection quotas are not assigned to OSHA Regional and Area offices. Inspection goals are set for each region as a management tool to ensure that all field offices are contributing to the agency's enforcement objectives. The quality of inspections is stressed in the agency's Field Operations Manual, in the standards against which the performance of individual compliance officers is measured, in the agency's periodic internal audits of its Regional and Area Offices, and in frequent, often informal, exhortations by national and field managers at all levels.

Since its inception, OSHA has inspected large construction sites, not to inflate its inspection statistics, but because the large sites tend to be the most hazardous. OSHA's intent is not to give an impression of greater inspection activity than has actually taken place. It it is common knowledge that construction sites are multi-employer sites and that under the

OSH Act, the agency must hold each employer responsible for providing a safe and healthful place of employment for his or her employees. There is no subterfuge here. It has always been OSHA's practice to include every subcontractor on a construction site in the inspection of that site. The objective is not to generate numbers, but to conduct a thorough investigation in accordance with the OSH Act.

The balance between productivity and quality is always of concern to management. It is always possible that some of our employees may have misunderstood our policy and even that a few among them may have perverted our system to focus on the quantity of inspections conducted rather than on what was accomplished in the course of those inspections.

I was acutely concerned by the testimony presented at the April 19th hearing. The apparent revelations came as a complete surprise to me. Since then, as I promised during my testimony on April 20th, we have begun a thorough investigation of the allegations. While our inquiry is not yet complete, I can share with you some of the preliminary results of our investigation.

Immediately following the April 20th hearing, we undertook a thorough review at the National Office of the relevant case files for the Irving, Texas, Area Office and of the inspection data for the rest of the country for the final months of FY 1987. Our examination in the National Office of the conduct and the results of the inspections in question revealed no irregularities or departures from the agency's established procedures for conducting inspections. Indeed, we have found from this paper review that the inspections in question were conducted and completed in the days directly following the opening conferences and that the number of serious violations found on these inspections exceeded the average for comparable inspections in other areas.

We are now completing an onsite investigation in the Irving Area Office. Our onsite investigation at the Texas office will enable us to determine whether in scheduling these inspections there were any irregularities which could have adversely impacted the agency's mission. For example, were any complaints not responded to in order to schedule these construction inspections? Were any more pressing manufacturing inspections that should have been scheduled, not scheduled in order to allow these construction inspections to be conducted? We expect to complete our investigation shortly and will provide the Committee with a full report at that time.

As to rewards to OSHA's field managers for good performance, all OSHA managers are enrolled in the Federal Performance Management Recognition System. This system was established by the Office of Personnel Management to reward managers with bonuses when merited by performance. OSHA's field personnel does not necessarily receive annual bonuses from this system; their compensation depends upon how well they carry out the agency's objectives. Among their performance objectives are the enforcement goals which have been established for each regional and area office. There are other objectives as well. OSHA's field managers are evaluated on the many facets of good management, including the ability to manage human resources, maintain effective lines of communication with other units of government and the private sector, meet financial targets, and provide technical and policy guidance to subordinates. Enforcement goals are just one element of the duties of an Area Director and Regional Administrator.

7. Numbers of OSHA Compliance Officers

Questions:

"- What is the actual number of OSHA compliance officers excluding supervisors, trainees, and 11 c investigators, none of whom normally conduct inspections?

- Is the number of such compliance officers adequate to fulfill OSHA's mission?

- If the number is adequate why is it necessary to exert pressure on compliance officers for numbers of inspections?"

Response:

Excluding supervisors and 11(c) investigators, the number of Compliance Safety and Health Officers employed by OSHA as of the end of April was 963. It is an error to assume, however, that supervisors and trainees do not conduct inspections. Compliance Officer supervisors oversee and review the inspection process. In the performance of their duties they may also directly assist in the conduct of onsite inspections, particularly in the case of difficult or complicated workplace visits. Newly-hired compliance officers also accompany more experienced compliance officers on inspections, and, under limited circumstances, may conduct inspections on their own. While 11(c) investigators do not conduct worksite inspections, they play an important role in workplace safety and health by looking into workers' allegations of discrimination for safety and health activities authorized under the OSH Act. As of the end of April, the total number of OSHA compliance officers, including supervisors and 11(c) investigators, was 1170.

OSHA, like any organization or business, must marshal its resources to address activities it hopes to accomplish. To implement an effective enforcement program, OSHA needs a wide array of compliance officer staff. This staff must include not only the journeymen compliance officers (grades GS-11 and above), but also: new hirees and less experienced staff at the GS-5, -7, and -9 levels, who must of course undergo varying degrees of on-the-job training; supervisors who oversee the scheduling and conduct of inspections and not infrequently participate in the inspections themselves; and finally the 11(c) investigators who support the agency's enforcement effort by making it possible for workers to notify OSHA of dangers at their places of employment without fear of retribution from their employers. All these categories of compliance officer staff are needed for OSHA to implement an enforcement program. The number of compliance officers invariably cited by the agency is the number that includes all these categories and is the number that the agency uses in requesting funds from and reporting to the congressional appropriations committees. When we are asked for the number of our compliance officers by another congressional committee or a member of the public, we give this number -- not to inflate our numbers as is implied in the question -- but because it is the number of compliance officer staff needed to carry out our enforcement mission.

You will not be surprised when I tell you that, yes, I believe the present number of authorized compliance officers is adequate to fulfill OSHA's mission. The OSH Act provides the agency with a wide range of tools in addition to its enforcement authority. These tools include provisions for standards-setting, consultation, educational services, training, and voluntary protections. The State occupational safety and health programs, which are authorized by the OSH Act, provide a valuable supplement to the resources available at the Federal level. Using the full complement of programs authorized by the OSH Act, this agency is making significant progress in reducing workplace injury and fatality rates. I must also acknowledge that the many demands on OSHA for its services require careful prioritization and challenge the agency to find new and creative ways to expand the impact of its programs.

As stated in response to the previous question on the number of OSHA inspections, the agency's compliance officers are not pressured to produce a set level of inspections. Enforcement goals established for each office are simply one of a number of management tools by which OSHA staff are judged.

8. Wood Dust

Questions:

"Dr. Peter Infante, from the Office of Risk Assessment, testified that between 1.1 and 3.3 million workers are exposed to wood dust on the job. I also understand from his testimony that wood dust causes nasal cancer, a decrease in lung function, asthma and dermatitis.

"Currently, OSHA does not have any kind of standard for wood dust.

"The Carpenters Union and three other unions petitioned OSHA in March 1985 to develop a health standard for wood dust.

"Dr. Infante testified that he believed there was enough information in 1986 on the toxic effects of wood dust to begin regulating and he so concluded that in two options memoranda."

"- It has been more than three years since the agency was petitioned by the unions. When will OSHA decide whether or not to regulate wood dust?

- Do you think it should take this long to make such a decision when so many workers are exposed to a substance with well-established toxic effects?"

Response:

Following receipt of the petition, OSHA reviewed all available information on the hazards of wood dust and the degree of exposure. The agency also contracted for new studies. Information developed through this research led OSHA to include wood dust among the substances in its project to update the agency's existing permissible exposure limits (PELs) for about 400 air contaminants and to add exposure limits for 200 other substances. Through this rulemaking, known as the "PEL Project," the agency can establish a wood dust standard in the most expeditious manner. The PEL Project, which was published as a proposal on June 7, 1988, proposes a limit of 1 milligram of hardwood dust and 5 milligrams of softwood dust per cubic meter of air. OSHA expects to issue the final standard in November.

The research necessary to make this decision was time-consuming. Special studies were needed to verify exposure data and information on feasibility. Only after a thorough analysis of the data did OSHA make the decision to include wood dust as part of the larger rulemaking effort.

9. Formaldehyde

Questions:

"As you are aware, a final standard for formaldehyde was published on December 4, 1987. Dr. Rodgers, Dr. Infante, and Mr. Martonik testified that the December 4th version of the standard departed significantly from an earlier version prepared on September 15th.

"In particular, Dr. Rodgers testified that the cancer risk assessment was changed. She testified that she was told in a meeting that you agreed with Mr. Baroody to reconsider the cancer risk assessment in the September 15th draft which had been upgraded from the proposal based on new scientific evidence. The risk assessment in the September 15th version indicates that the cancer risk to workers would still be significant with the new exposure limit of 1ppm.

"Dr. Rodgers and Mr. Martonik testified that they subsequently prepared an options memorandum for you in which they defended the new cancer risk assessment. Despite their recommendation, Dr. Rodgers was ordered to change the risk assessment to indicate that there was no significant cancer risk to workers with the new standard following a meeting between you and Mr. Baroody. Documents presented at the hearing indicated that you ordered the change.

- Why did you order the change in the cancer risk assessment when your health scientists recommended against doing so? Was your order in response to pressure from Mr. Baroody?"

Response:

The cancer risk assessment for formaldehyde was not changed. Upon review of the data, it was evident that the risk assessment calculations had been completed using four different methods. The results produced by the various methods indicated that the remaining risk at the permissible exposure limit (PEL) established in the standard ranged from less than one death per thousand exposed to greater than 100 deaths per thousand. Rather than select one approach as most correct, the decision was made by OSHA to indicate the range of risk. OSHA concluded that the PEL and other provisions of the standard would reduce the risk to a level that could be reasonably accepted as no longer being significant. This approach to risk assessment did not alter in any way the protection afforded by the standard, nor was there any disagreement concerning the exposure limit set for formaldehyde.

10. MOCA

Questions:

"On November 5, 1987, the Public Citizen Health Research Group and five other unions jointly petitioned OSHA to issue an emergency temporary standard to protect workers from occupational exposure to MOCA

"I understand that MOCA was regulated by OSHA for a brief period in 1973-74 but that the Court of Appeals remanded the MOCA standard because OSHA did not follow a procedural technicality. Currently, there is no standard to regulate MOCA and 14 years have passed since the court's decision.

"I also understand that there is considerable evidence indicating that MOCA is a carcinogen. In 1987, NIOSH reported to OSHA two cases of bladder cancer in young workers exposed to MOCA.

"A February 18, 1988 draft memo prepared for you states, 'Health Standards is of the opinion that a standard to control occupational exposure to MOCA is needed.'

- Fourteen years have now passed since the court remanded the standard to OSHA on a mere technicality. The scientific literature on MOCA's toxic effects has only grown more convincing. When will OSHA regulate MOCA?"

Response:

MOCA will be regulated as an air contaminant in the PEL Project described above in my response to Question 8. A new exposure limit will be set for MOCA as part of that effort. As stated in the response to the questions on wood dust, a final standard is expected in November 1988.

11. Silica

Questions:

"There is highly suggestive data indicating that silica and other man-made mineral fibers cause cancer. IARC lists silica as a Group 2A substance, which is defined as a probable carcinogen.

"I understand that OSHA's current standard for silica is based on outdated methods for monitoring exposure and that, as a result, compliance officers are not testing for silica levels."

"- How many workplaces have been inspected for silica exposure in the last 5 years?
- What has been the level of compliance?"

Response:

It is not possible to determine from OSHA's computerized inspection data system the number of workplaces that have been inspected for exposures to particular substances. When there is a separate standard for a substance, it is possible to determine how many workplaces have been found in violation of the standard, but not how many have been found in compliance. Silica, however, is not regulated by a separate standard, but rather under permissible exposure limits listed for approximately 400 air contaminants at 29 CFR §1910.1000 (the "Z Tables"). We can determine from our inspection data system how many workplaces have been cited for violations of 1910.1000, but not for which of the contaminants listed there.

The best information we can provide in response to your question is from the records of OSHA's Salt Lake City Laboratory, where air samples taken on inspections are sent for analysis. The laboratory has reported to us that from July 1983 through July 1988, air samples which were analyzed for silica content were taken on 1,627 inspections. (Silica is defined as both respirable and non-respirable quartz.) On 710 of those inspections, levels of silica greater than the permissible exposure limit (PEL) were detected in at least one of the samples taken. On 218 inspections, levels of silica less than half the PEL were detected in at least one of the samples taken. On 247 inspections, levels more than half the PEL, but lower than the PEL, were detected in at least one sample. On the remaining inspections, no silica was detected in any of the samples taken, or in a few instances, samples were taken, but not analyzed. Thus, of the 1,627 workplaces inspected for silica exposures in the past five years, 917, or 56.4 percent, have been in compliance with the OSHA standard.

Question:

"- When is OSHA going to update the standard so that it is not based on outdated technologies?"

Response:

Current methods of determining silica exposure, which have been in use for several years, are accurate and reflective of actual employee exposure. The permissible exposure limits for silica in OSHA's current standard (at 29 CFR §1910.1000) vary with the level of free quartz found in the dust sampled. OSHA has proposed in its PEL Project (described above in the response to Question 8) to set a single permissible exposure limit for silica of 0.1 milligram of dust per cubic meter of air. This standardized, lower limit will not only afford workers greater protection, but will also simplify the laboratory analysis necessary to determine silica exposure.

12. Enforcement of the Field Sanitation Standard

Questions:

"The Committee heard testimony from Ms. Juanita Cox, a former farmworker, who is now a volunteer organizer for the United Farmworkers in San Juan, Texas.

"Ms. Cox said that she is calling the OSHA Area Office immediately when there are no toilets in the fields or cups or when there is no water to drink and wash with. But in order to get an inspection she has to send a letter to the nearest area office detailing her complaint.

"The nearest office is in Corpus Christie, Texas which is a three-hour drive from the San Juan area. Ms. Cox said that by the time the OSHA office receives her written complaint and an inspector drives the three hours or more to the field where the complaint originated, the work in those fields is often finished.

- Do you think OSHA is effectively enforcing the field sanitation in the San Juan area?

- Do you think that OSHA needs an office closer to the San Juan area in order to maintain an effective enforcement presence?"

Response:

The Occupational Safety and Health Administration is effectively enforcing the Field Sanitation Standard in the area of San Juan, Texas. From October 1 through June 5 of the current fiscal year, OSHA conducted 19 inspections for compliance with the Field Sanitation Standard at agricultural operations in the vicinity of San Juan. Thirteen of those inspections were programmed -- that is, initiated by the agency; five were in response to complaints, and one was a referral. Sixteen additional inspections, which were attempted in response to complaints or referrals, could not be conducted for one of the following reasons: the jobs were completed; there were no employees working at the sites at the time of the attempted inspection, or there were fewer than eleven employees on site. (In accordance with the rider to OSHA's annual appropriation which restricts OSHA's activities for small farms, the scope of the field sanitation standard was limited to agricultural establishments where eleven or more employees are engaged on any given day in hand labor operations in the field.)

It would not be a practical solution to the problem perceived by Ms. Juanita Cox for OSHA to maintain an office closer to the San Juan area. Field worker activities are seasonal and short in duration. We believe that OSHA is reaching a sufficient number of agricultural operations in the area to effectively enforce the Field Sanitation Standard. We will review the results of our inspections in the San Juan area at the end of the fiscal year (after the major harvest season) to determine if the agency has been able to establish a sufficient presence to encourage compliance with the provisions of the standard.

Questions:

"I have also attached a copy of a study conducted by the Farmworker Legal Services of New York during the harvest season last fall. The study found that of 21 farms surveyed in New York state, only 1 provided water for handwashing, 1 provided cups for drinking, and only 4 provided toilets.

- How many inspections did OSHA conduct in New York during the fall of 1987?

- How many inspections is OSHA planning to conduct next year?"

Response:

One inspection was conducted in New York during the fall of 1987. The standard had been fully enforceable for less than two months at that time, and only a short growing season remained.

Information on planned FY 1989 inspection activities is not available at this time; it will be available after September 25, 1988, when planning for the next fiscal year has been completed. In FY 1988, as the table provided below shows, nine programmed inspections are expected to be accomplished in New York. This goal does not include an estimate of unprogrammed inspections such as complaint investigations, which obviously are not planned in advance.

Question:

"- How many inspections is OSHA planning to conduct nationwide this year and next year, broken down by states?"

Response:

In FY 1988, OSHA is planning to conduct 1,090 programmed inspections for compliance with the Field Sanitation Standard; 675 of these inspections will be conducted by Federal OSHA, and 415 by the States which operate their own federally approved job safety and health programs under section 18(b) of the Occupational Safety and Health Act. As noted above, OSHA's projected goals for FY 1989 will not be available before September 25. These planned inspection goals of course do not include any estimates of complaint investigations or other unprogrammed inspections since these cannot be planned in advance.

A table of OSHA's FY 1988 goals for programmed, Field Sanitation inspections, broken down by State, follows:

Table
Programmed Inspections - Field Sanitation - FY 1988

Region		Federal OSHA		State-Plans	
	Inspections	State	Inspections	State	Inspections
I	16	Maine	3	Vermont	1
		Mississippi	3		
		New Hampshire	3		
		Connecticut	3		
		Rhode Island	3		
		Puerto Rico	0	Virgin Islands	0
II	27	New York	9		
		New Jersey	18		
III	54	Pennsylvania	23	Maryland	7
		Delaware	1	Virginia	19
		West Virginia	4		
IV	376	Alabama	5	Kentucky	66
		Florida	146	North Carolina	91
		Georgia	23	South Carolina	19
		Missouri	4	Tennessee	22
V	73	Ohio	28	Indiana	5
		Wisconsin	1	Michigan	27
		Illinois	0	Minnesota	12
VI	37	Oklahoma	0	New Mexico	6
		Texas	31		
		Louisiana	0		
		Arkansas	0		
VII	9	Missouri	4	Iowa	1
		Nebraska	2		
		Kansas	2		
VIII	23	Colorado	7	Utah	3
		North Dakota	7	Wyoming	2
		Montana	4		
IX	368	California	317	Arizona	16
				Hawaii	34
				Nevada	1
X	107	Idaho	24	Alaska	0
				Oregon	23
				Washington	60
				Washington	60

Question:

"- What are the levels of compliance with the new standard?"

Response:

The following table shows that in FY 1987, 60 percent of agricultural operations inspected by Federal OSHA were in compliance with the Field Sanitation Standard. For the first eight months of FY 1988, 45 percent of operations inspected were in compliance with the standard.

Table
Levels of Compliance with the Field Sanitation Standard
(Federal Inspections)

FY	Inspections Conducted	Inspections without Cited Violations	Percent in Compliance
1987	303	183	60%
1988*	296	132	45%

*through May 31

Questions:

"- Has OSHA started a special emphasis program to launch the enforcement effort?

- Has OSHA conducted any training of inspectors or farmers to promote compliance with the field sanitation standard?"

Response:

OSHA's present effort to enforce the Field Sanitation Standard constitutes a special emphasis program since the agricultural workplaces being scheduled for inspection would otherwise not be programmed for inspection under any of the agency's existing targeting systems. These workplaces are receiving a larger share of agency inspection resources than would be the case without the present special enforcement program. The agency's Directive to its field staff on enforcement of the Field Sanitation Standard (a copy of which is appended to this response) assigns special inspection goals to each region, as in other emphasis programs.

The Directive, which explains clearly what constitutes compliance with the standard, is an instructional tool not only for OSHA's compliance officers, but also for employers and employees, or their representatives. OSHA believes that compliance officers do not require additional training to conduct Field Sanitation inspections. No specialized technical knowledge is needed. There is no training course available for farmers nor has there been any request from farmers for such a course. Copies of the standard and the agency directive are of course available in all Area Offices.

Question:

"I also understand that the Wage and Hour Division of the Department of Labor conducts migrant camp inspections to insure that fair wages are being paid. The Wage and Hour Division can easily determine from wage records whether 11 or more workers were employed on a farm at any particular day in a given year, indicating whether the farm is covered by the Field Sanitation Standard.

- Would it not be logical for OSHA to conduct field sanitation inspections in conjunction with the DOL Wage and Hour Division?"

Response:

Agricultural operations which merit a field sanitation inspection do not necessarily have migrant labor camps. In operations where such camps exist, the camps are often a long distance from the hand-picking labor that needs inspection. While OSHA combines its own inspections of migrant camp housing with field sanitation inspections if possible, in practice that often proves not feasible. Such scheduling diffculties would be multiplied if OSHA tried to conduct field sanitation inspections in conjunction with the migrant housing inspections of the Wage and Hour Division of the Department of Labor's Employment Standards Administration (ESA).

Under an agreement entered into in 1979, three agencies of the Department of Labor -- ESA (in which the Wage and Hour Division is located), the Employment and Training Administration (ETA), and OSHA -- coordinate inspections of migrant farm labor housing in order to make the most efficient use of the Department's enforcement resources. Among other things, the agreement provides that when an inspector of one agency becomes aware of migrant camps with hazards that are outside its jurisdiction, the inspector refers that camp to the appropriate agency for inspection. We believe that this arrangement is more efficient than scheduling joint inspections.

13. Employers with significant histories of workplace fatalities

Questions:

"In a 1987 semiannual report, the Office of the Inspector General concluded that 'OSHA does not: (1) identify and target for inspection those employers with significant numbers of workplace fatalities, and (2) use its nationwide fatality inspection data in citing and penalizing repeat violations.'

"In the same report, the OIG recommended that OSHA target for inspection those employers with significant histories of workplace fatalities and routinely use all available inspection data in citing and penalizing such employers. "

- Has OSHA acted on these recommendations or taken any other actions to improve the agency's record in targeting and inspecting employers with significant histories of workplace fatalities?

Response:

We are studying ways in which fatality data could be better used to target inspections. Meanwhile, the agency continues to investigate every fatal accident that comes to its attention and to cite employers who fail to report accidents resulting in worker deaths and multiple hospitalizations. As the response to the following question (Question 14) indicates, OSHA appears to be investigating virtually all of the occupational fatalities which come under its purview.

Any new targeting system based on fatality data would have to be an improvement upon current procedures; that is, the new system would have to identify workplaces which have a greater number of serious hazards than the workplaces identified under the existing system. At present, industry lost workday injury rates are the basis of safety inspection targeting.

In considering the possible inclusion of establishment fatality data in our targeting system, we are seeking solutions to certain practical problems. It is difficult to identify employers who have significant histories of workplace fatalities. There are problems both in name identification and in determination of what constitutes a significant history of fatalities. Fatality rates cannot be used for this purpose because a single fatality in a small firm drastically skews the firm's rate, giving a distorted picture of the employer's true record. In the construction industry, name identification is particularly difficult. Contractors operate in different localities under different names. Also, a subcontractor on a large project who may have been responsible for a workplace fatality on an earlier project could easily be overlooked in a targeting system.

We are continuing to study how to improve inspection targeting. We expect to institute a pilot project to test new targeting methods early in FY 1989.

14. Underreporting of fatalities

Questions:

"I have attached a recent study conducted by the Department of Health in New Jersey entitled 'Data sources for a fatal occupational injury surveillance system in New Jersey.' The report found that the OSHA IMIS file did not identify 45% of occupational fatalities in New Jersey between 1984-5 and that 34% of those fatalities were not investigated by OSHA.

"In addition, the Committee heard testimony from Dr. Earl Pollack, the study director of a National Academy of Sciences study entitled, Counting Injuries and Illnesses in the Workplace. Mr. Pollack cited a major finding of the report in his testimony: 'There is no single agreed upon estimate of the number of ocupational fatalities in the United States...The panel found it rather startling that an agreed-upon method has not been devised to estimate a phenomenon as basic as traumatic death in the workplace.' (p.6)

- In light of these alarming findings, what is OSHA doing to improve its ability to identify occupational fatalities?"

Response:

We do not consider the "findings" noted in the question to be alarming. A comparison of the fatalities reported by the Bureau of Labor Statistics (BLS) with OSHA's inspection data, as recorded in the agency's Integrated Management Information System (IMIS), will show that OSHA investigates virtually all occupational fatalities which come under its purview. In FY 1987, Federal OSHA investigated 1,026 fatalities in the course of 945 fatality investigations (some of which covered multiple deaths). (These are recorded in the agency's IMIS.) In 1986, the latest year for which BLS data are available, the Bureau reported 3,600 work-related deaths in the universe of workers that come under OSHA's jurisdiction. Of the occupational fatalities, which BLS reports each year, the Bureau has calculated that 50 percent are the result of motor vehicle accidents, heart attacks, aircraft crashes, and assaults -- hazards which are not addressable by OSHA. The BLS fatality estimate includes deaths among workers in State-plan States (the States which operate their own federally approved job safety and health programs). Federal OSHA covers roughly 60 percent of American workers, and the State-plan States cover the remaining 40 percent. If we examine the BLS-reported estimate of 3,600 work-related deaths (50 percent of which are not addressable by OSHA and only 60 percent of which come under Federal OSHA's jurisdiction), we find that only 50 percent of 60 percent of the 3,600 deaths reported by BLS would normally be investigated by Federal OSHA. Since Federal OSHA in fact investigated more than 1,000 occupational fatalities in FY 1987, it would appear that occupational fatalities are not escaping the agency's notice.

As to the lack of a "single agreed upon estimate of the number of occupational fatalities in the United States," it is true that there are discrepancies among the number of work-related fatalities reported by the Bureau of Labor Statistics (BLS), the National Institute for Occupational Safety and Health (NIOSH), and the National Safety Council. It is apparent, however, that the discrepancies are directly related to the different universes surveyed and therefore are not a cause for alarm. The BLS fatality estimates, which exclude self-employed persons, public employees, and employees of employers with ten or fewer employees (all outside the jurisdiction of most OSHA inspections), naturally are lower than the fatalities reported by the other groups, which cover all categories of U.S. workers. The fatalities reported by the National Safety Council do not cover a well-defined population. Moreover, they include a percentage of all motor vehicle accidents as work-related and are therefore higher than other estimates. If we look at BLS and NIOSH fatality data, the differences are easily understood. As noted, BLS reported 3,600 work-related deaths in 1986 for the universe of workers described above, whereas NIOSH reported an annual average of 6,900 deaths for the five-year period, 1980-1984, for all U.S. workers. The Office of Technology Assessment has estimated an average number of 6,000 work-related fatalities over the past several years, based on BLS data with extrapolations for the workers not included in the BLS estimates. This number is not very different from the NIOSH estimate of 6,900 annual work-related fatalities.

OSHA is familiar with the New Jersey study which concluded that the agency's computerized Integrated Management Information System (IMIS) file did not identify significant numbers of workplace fatalities and that about one-third of those fatalities were not investigated by OSHA. The report also points out that the study was not designed to determine whether employers were failing to report, or OSHA was failing to investigate, accidents. In fact, the first eight cases listed in Table III of the New Jersey study describe situations in which OSHA would not normally conduct an inspection. Inclusion of these cases in the study inflates the percentage of uninspected cases. In addition, as is mentioned, the New Jersey coding system requires considerable interpretation and introduces coding errors in ten percent of the cases.

There are several projects under way within the agency to improve the reporting of occupational fatalities. In Colorado, OSHA has an agreement with the State Department of Public Health under which the Denver Area Office will receive a copy of all death certificates coded as "work-related." We will monitor the effectiveness of this project and will consider expanding it to other parts of the country. BLS has a similar project under way in certain counties in Texas and should have some conclusions to report soon. BLS, NIOSH and the National Center for Health Statistics have formed a working group to create a definition of "work-related fatality" that is acceptable to workers compensation systems, medical record coding protocols, and Federal health reporting systems such as that maintained by the Social Security Administration. A common definition may form the basis for design of new systems to collect information about deaths in the workplace.

ATTACHMENT
(QUESTION 5)

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

* *
ANN McLAUGHLIN, Secretary of Labor, *
United States Department of Labor, *
*
Complainant, *
*
v. * OSHRC DOCKET NO. 88-550
*
SCOTT PAPER COMPANY, *
*
Respondent, *
*
UNITED PAPER WORKERS INTERNATIONAL *
UNION, *
*
Authorized *
Employee *
Representative *
* *

STIPULATION AND SETTLEMENT AGREEMENT

I.

Complainant and Respondent have reached a full and complete settlement of the above-captioned matter presently pending before the Occupational Safety and Health Review Commission. The parties hereby agree as follows:

II.

(a) The Occupational Safety and Health Review Commission (hereinafter the "Commission") has jurisdiction of this matter pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590: 219 U.S.C. §651 _et seq._) (hereinafter the "Act").

(b) Respondent, Scott Paper Company, (hereinafter "Scott"), is a corporation with its principal place of business located in Tinicum Township, Delaware County, Pennsylvania. It has been at all times material to this proceeding engaged in the business of manufacturing and has operated a manufacturing facility located in Winslow, Maine. During the course of its business, its employees perform various tasks in the nature of manufacturing.

During the course of its business, Scott, at its Winslow, Maine plant, uses material and equipment which it receives from places located outside Maine. Scott, as a result of the aforesaid activities, is an employer engaged in a business affecting commerce as defined by Section 3(3) and 3(5) of the Act, and has employees as defined by Section 3(6) of the Act, and is subject to the requirements of the Act.

(c) As a result of an inspection conducted on March 25, 1987 through August 28, 1987, at Respondent's workplace in Winslow, Maine, citations for Willful, Repeated, Serious and Other-than-Serious violations were issued to Respondent on December 1, 1987, pursuant to Sections 8 and 9 of the Act.

(d) Respondent filed a timely notice of contest to the citations with the Secretary of Labor, which was duly transmitted to the Commission. The penalties are not in contest as they have been resolved in connection with a companion matter, OSHRC Docket No. 87-1682.

III.

The parties have consulted at length and agree to the dispositions of citations and abatement requirements as set forth below.

(a) Scott withdraws its Notice of Contest for the following items, and agrees they shall be affirmed as the final Order of the Commission:

S-1 1/	c,d, j-q
S-2	a-d, f-k, m, o-r, t,v,x,z, cc-ff, hh, jj-oo, pp-3, rr-tt, uu-1, uu-3.
S-3	b, c, f, h, i
S-4	a-d, f
S-6	a, c, d

1/ List is by Citation Type, e.g. S-Serious, Item Number, and Instance letter, where letters are separated by a dash (-), all letters in between are included, e.g., a-e is equivalent to a,b,c,d,e.

S-7	a, b, e, f, g, i, j-n.
S-8	a-e, g, h, l, n-2, n-3, n-4, o-ii.
S-9	
S-10	a, b-2, 3, 4, c-1, d-h.
S-11	a-f, h, j-n, p-aa.
S-12	a-m, o, p.
S-13	a-k, m, o, q-mm, pp-vv, xx.
S-14	a-e, g, h.
S-15	
S-16	
S-17	c-f, h, i-1, i-3.
S-18	a-x, aa, bb, dd.
S-19	a-i, k-1, k-3, l-y
S-20	a-n, p-s, v-cc.
S-21	a-h, j-p, r-u, w-z.
S-23	a-d, f-k.
S-24	
S-25	
S-26	b
S-27	
S-29	
S-30	
S-31	
S-32	c-1.
S-35	
S-38	h, i.
S-39	

S-40	
S-41	
S-42	
S-43	a-g.
S-44	
S-45	
S-47	
S-48	
S-49	
S-50	
S-51	
S-52	b-e.
S-53	
S-58	
S-59	
S-60	
S-61	
S-62	
S-63	c.
S-64	b.
S-65	
S-66	
S-67	
S-69	e-g, i, j, m, o, p, q.
S-70	c-g, j, l, m, o-q.
S-72	
S-73	
S-74	

S-75	
S-76	d-h, j-m, o, r-v, x-z, cc, dd, ee-1, ee-2, ff-ii, kk, ll.
S-77	b-d, f.
S-78	
S-80	
S-81	a-c, e-g, i-qq, ss-oooo, qqqq-bbbbb, ddddd-uuuuu.
S-82	
S-83	
S-84	
S-85	
S-86	a-e.
S-87	a, b.
S-88	b, c, d, f.
S-89	
0-2 [2]	a-b.
0-3	
0-4	b, c.
0-5	
0-7	
0-8	c.
0-9	
0-10	
0-11	
0-12	

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[2] Other-than-Serious.

0-16	
0-17	
0-18	
0-19	
0-20	
0-21	
0-22	
0-23	a, c-k, m-u, x-z.
0-24	

(b) OSHA withdraws the following citation items, and agrees they shall be vacated as the final Order of the Commission:

W-1 [3]	a.
R-2 [4]	c, n.
S-1	a, f, h
S-2	e, l, n, s, u, w, y, aa, bb, gg, ii, pp-1, pp-2, qq, uu-2, vv.
S-3	a, d, e, g.
S-4	e.
S-7	c, d, h.
S-8	f.
S-10	b-1, c-2.
S-12	n.
S-13	l, n.

---

[3] Willful.
[4] Repeat.

S-18	y, z, cc.
S-19	j.
S-20	o.
S-21	v.
S-23	l.
S-28	
S-32	b.
S-33	
S-38	e-g, m.
S-46	
S-52	a.
S-63	b.
S-69	a, b, c, d, h, k, l, r.
S-70	a, b, i, h, k.
S-71	
S-76	a, b, p, bb.
S-79	
S-81	d, rr, pppp, ccccc.
S-86	f.
S-87	c.
S-88	a.
O-2	d.
O-4	a.
O-8	a, d.
O-15	c, f-1.
O-23	b, l, v, w.

(c) OSHA withdraws the following citation items without prejudice. The items shall be vacated with the understanding of the parties that OSHA shall not be barred thereby from issuing citations in the future based on the same or similar facts.

S-14 f.

Scott will put up appropriate warning signs and will re-examine the area periodically to determine the feasibility of guarding. The violation description should reflect "Div. A", rather than "Div. B".

S-63 a.

S-76 c, n, aa, ee-3.

0-8 b.

(d) The following citation items are modified pursuant to the agreement of the parties. Scott withdraws its Notice of Contest for these items as modified herein.

S-1 b, g.

The instance descriptions shall be "Receptacles were not fully enclosed with an adequate box and cover."

S-5

The introductory paragraph is deleted, and replaced as follows: "Employees were not provided with safe access to elevated work areas. One means of abatement is to use scaffolds with guardrails and with planks at least 18" wide which are cleated and extend no more than 18" beyond their bearers."

S-6 b.

This instance is redesignated as Other Item No. 27 (O-27) and is deemed a violation of 29 CFR 1910.22(b)(1).

S-11 g, o.

The instance description is modified by deleting any reference to lack of a rail on the right side descending (closed side).

S-13 p.

The instance description is modified to change "entry" to "entire".
S-19 k-2.

The instance description is modified to amend "12 feet" to "12 inches".

S-22

Add to the instance description: "Note: Additional guarding is not required where exposure is limited to oilers and lube points are extended to the rail of the walkway.

S-23 e.

The "Note" is deleted.

S-32 c-2.

Scott may block off access as a means of abatement.

S-38 j, k.

The instance descriptions shall be:

j) Warehouse, Storage Area 99S B1- Bales of flat cardboard stock were stacked in an unstable manner and were leaning in the direction of an active aisleway.

k) Warehouse, West Side, near railroad tracks - Boxes containing JRT dispensers were stacked in an unstable manner and were leaning in the direction of an active aisleway.

S-57

The citation is modified to "Monthly inspections were not made of cranes in regular use."

S-64 a.

One method of abatement would be to modify the work procedure so as to start the loading process by lowering the pressure block not more than 4 feet below the operating floor level. As the pressure chamber is filled, the pressure block would be repeatedly lowered in 4 foot increments until charging is complete and the process is ready for the Compression cycle.

S-68

Add abatement note to the description: "Note" One acceptable method of abatement is to utilize a device, such as an Aldor Box Car Opener and Closer, designed to be used with a forklift so the trucks' wheels will not be exposed to slipping off the dock."

S-70 n.

This instance is redesignated as instance g) of S-61.

S-76 q, jj.

Each instance description is modified to begin with, "In a wet location..."

S-76 i, w.

These instances shall become instances (aa) and (bb) of O-23 and shall be modified as follows:
aa) Warehouse, Damage Repack Area - Two extension cords were used to power glue guns. A branch circuit should have been installed.
bb) Warehouse, outside Distribution Office - An orange extension cord was used for truck recharging. A branch circuit should have been installed.

S-77 a.

The description is modified to more clearly describe the locations as "Warehouse, by door 44 and across from door 50."

S-77 e.

This instance is redesignated as instance mm of S-76.

S-86 g-p.

Among acceptable alternative methods of abatement would be 1) to seal equipment to minimize entry of easily ignitable fibers and flyings (tissue dust); 2) to improve housekeeping to minimize accumulations of tissue dust.

Note: Modification of electrical equipment to attempt to conform to Class III location standards may present additional hazards. OSHA does not necessarily approve such modification and the parties recognize that any risks associated therewith shall be Scott's.

S-90

Scott's withdrawal of its notice of contest shall not be construed as an admission on its part that 1) the worksite described in the citation is a construction site; 2) the employees were engaged in construction work subject to the construction standards; or 3) the outlets were not part of the permanent wiring of the building.

S-91

This citation is redesignated as a violation of 1910.28(a)(5) and becomes instance d of S-5.

0-2 c.

The description is modified to change "boards" to "barrels".

0-13

The charge is amended to "crossovers were not provided where employees were required to cross over shafts".

0-15

This item is redesignated as an Other-than-Serious violation of 29 CFR 1910.303(b)(1).

W-1 b, c.

These instances are redesignated as Serious, Item 94, under §5(a)(1) of the Act.

The instance description in the Citation is deleted.

The Charge shall be, "Employees who were required to use scaffolds for their work, were not adequately trained about safety hazards and appropriate safety measures, with respect to 1) the proper selection of scaffolds, 2) the use of fall protection, 3) compliance with load limitations, and 4) the use of outriggers."

OSHA's redesignation of this citation should not be construed as reflecting any belief or position by OSHA that Scott was not performing construction work at the time of the violation. It remains OSHA's position that Scott is subject to the safety standards for construction (29 CFR Part 1926) when its employees perform work within the scope of 29 CFR 1910.12.

W-2 a.

This instance is redesignated as Serious, Item 95 (S-95) for violation of 1910.28(a)(2).

The description is modified as follows:

In the following instances, the footing or anchorage of scaffolds was not sound, rigid and capable of carrying the maximum intended load without settling or displacement:

a) Boiler House, West Outside Wall - A mobile scaffold set at approximately 12 feet was not secure so as to provide stable footing for an employee.

b) Main Office Building, West Side - A mobile scaffold elevated to a height of approximately 25 feet, was not secure so as to provide stable footing for employees.

W-2 b.

This instance is redesignated as Serious, Item 96 (S-96) for violation of 1910.28(a)(12).

W-2 c.

This instance is redesignated as Serious, Item 97 (S-97) for violation of 1910.29(a)(3)(ii). The reference to "new construction" is deleted.

OSHA's agreement to redesignate W-2 a, b, c, above as violations of Part 1910 should not be construed as reflecting OSHA's acceptance that the work being performed was not construction work. It remains OSHA's position that Scott is subject to the safety standards for construction (29 CFR Part 1926) when its employees perform work within the scope of 29 CFR 1910.12.

R-1 a-e, f, h, j.

These instances are redesignated as Other-than-Serious, Item 25, (O-25).

R-2 a, b, d-i, l, m, o-q.

These instances are redesignated as Other-than-Serious, Item 26, (O-26).

R-3

This item is redesignated as Serious, Item 93 (S-93).

(e) OSHA withdraws the following Citation items without prejudice in return for Scott's pledge to abate the conditions in accordance with the terms of the citation, or as specified in this section.

S-1 e,i.

S-8 i, j.

Scott will post signs calling attention to the hazards of these ingoing nip points.

S-8 k.

Scott will place a chain across the entryway to restrict employee access, and will post warning signs. Scott will consult with appropriate machinery manufacturers to seek a guarding system which will be effective to protect employees but will allow the process to continue.

S-8 m, n-1, jj.

S-11 i.

S-13 nn, oo, ww.

S-17 a, b.

Guards will be installed to cover nip points.

S-17 g, i-2.

Warning signs will be used instead of guards, until a guard, which does not create a hazard or impede the operation, becomes available on the market.

S-20 t, u.

S-21 i.

S-21 q

Scott will provide poles and blowdown equipment, if necessary, to assist in removing tails, and the cleaning of the hood, and will post signs prohibiting employees from going out onto the hood structure.

S-26 a, c.

Fixed ladders will be used for access.

S-32 a.

S-34

S-36, 37

Scott will post signs warning of the possible release of carbon dioxide, and instructing employees to leave the area if the alarm sounds.

S-38 a-d.

Scott will instruct all material handling operators in the safe and proper procedures for stacking and unstacking stock, i.e., broke material, in the warehouse; and in the safe and proper operation of material handling equipment used to stack and unstack the material. Appropriate employees will be fully instructed no later than August 15, 1988.

S-38 1.

S-54

S-55

The appropriate ANSI Paragraph is 2.1.7.7(a).

S-56

S-69 c.

S-81 h.

S-88 e.

S-92

O-1	
O-6	
O-14	
R-1	g, i, k.
R-2	j, k.

(f) Respondent disagrees with the classification of the citations listed below and believes they should be classified as "other than serious" citations. However, for settlement purposes, Respondent accepts the proposed classification.

S-3	b, c, f, h, i
S-11	f, j, m, n, o, y
S-12	f, g, h, o, p
S-17	d, f
S-19	b-f, i, k-3, p, s, v
S-25	
S-26	a, b
S-32	c
S-44	b
S-52	b
S-76	gg, hh

(g) Scott agrees to fully abate all citation items as set forth in subparagraphs (a), (d) and (e), above, and other commitments in this Agreement. Regarding those items and instances which have not yet been abated, Scott agrees to the abatement schedule set forth in Appendix A. References in the Appendix are for citations as originally issued.

IV.

Each party hereby agrees to bear all of its own attorneys fees, costs and expenses arising out of and incidental to the instant matter.

WHEREFORE, the parties agree that under the above-noted conditions this matter docketed before the Commission as Docket No. 88-550 is hereby settled.

FOR COMPLAINANT:

George R. Salem
Solicitor of Labor

Albert H. Ross
Regional Solicitor

Jerrold Solomon
Jerrold Solomon
Attorney

U.S. Department of Labor
Office of Solicitor
Rm. 1803-JFK Federal Bldg.
Government Center
Boston, MA 02203

DATED: 5/25/88

FOR RESPONDENT:

L.J. Barry
L.J. Barry, General Manager
Scott Paper Company
14 Benton Avenue
Winslow, ME 04901

DATE: 5/24/88

FOR EMPLOYEES:

For Bruce A. White
Lee Pelletier
UPIU Local 911

DATE: 5/24/88

Jeff Cuares
UPIU Local 431

DATE: 5/24/88

Peter Morrisey
Peter Morrisey
IBEW Local 1768

DATE: 5/24/88

James A Rogers
James A. Rogers
IAM Local 1828

DATE: 5/24/88

APPENDIX A

Secretary of Labor
vs.
Scott Paper Company (Winslow)
OSHA Docket #88-550
Abatement Dates

Repeat Item #	Abatement Date
1	4/30/88
2 a, b, d-m, o-q	2/15/88
3	2/15/88

Willful Item #	Abatement Date
1 b and c	10/1/88
2 a	5/1/88
2 b	5/1/88
2 c	5/1/88

Serious Item #	Abatement Date
1 b, c, d, e, g, i, j, k, l, m, n, o, p and q	4/15/88
2 a-d, f-k, m, o-r, t, v, x, z, cc-ff, hh, jj-oo, pp-3, rr-tt, uu-1 and uu-3.	6/15/88
3 b, c, f, h and i	4/15/88
4 a, b, c, d and f	9/1/88
5	3/30/88
6	3/30/88
7 a, b, e, f, g, i, j, k, l, m and n	4/30/88
8 a-e, g, h, l, n-2, n-3, n-4, o-ii	2/1/89
9	6/30/88
10 a, b-2, b-3, b-4, c-1, and d-h	*10/1/88

*The parties recognize that this abatement period may not be adequate. Respondent agrees to use its best efforts to abate the cited conditions by 10/1/88, however, should additional time be required, Complainant agrees to grant a reasonable extension.

11 a-f, h, j-n and p-aa	5/15/88
12 a-m, o and p	3/1/88
13 a-k, m,o-oo and pp-xx	2/1/89
14 a-e, g and h	6/1/88
15	6/1/88
16	6/1/88
17	8/1/88
18 a-x, aa, bb and dd	2/1/89
19 a-i and k-y	6/1/88

Serious Item #	Abatement Date
20 a-n, p-t and v-cc	10/1/88
u	4/17/88
21 a-u and w-z	2/1/89
22 a, b and d	5/15/88
22 c	7/15/88
23 a-k	8/15/88
24	2/1/89
25	4/1/88
26	6/1/88
27	2/15/88
29	8/1/88
30	2/15/88
31	5/1/88
32 a and c	6/1/88
34	2/15/88
35	2/15/88
36	5/13/88
37	5/13/88
38 a-d	8/1/88
h, i, j, k and l	7/15/88
39	3/15/88
40	2/15/88
41	3/1/88
42	2/15/88
43	3/15/88
44	2/15/88
45	2/15/88
47	2/15/88
48	2/15/88
49	2/15/88
50	2/15/88
51	2/15/88
52	2/15/88
53	10/1/88
54	5/1/88
55	12/1/88
56	2/15/88
57	8/1/88
58	3/30/88
59	2/15/88
60	2/15/88
61	6/1/88
62	2/15/88
63 c	2/15/88
64	2/15/88
65	2/15/88
66	2/15/88
67	6/1/88
68	3/15/88
69 e-g, i, j, m, o, p, q	2/15/88
70 c-g, j, l, m, o-q	8/1/88
72	2/1/89
73	5/15/88

Serious Item #	Abatement Date
74	2/1/89
75	8/1/88
76 d-m, o, q-z, cc, dd, ee-1, ee-2, ff-ll	4/15/88
77	6/1/88
78	3/15/88
80	3/1/88
81 all instances except d, rr, pppp, ccccc	11/30/88
82	3/15/88
83	3/15/88
84	3/15/88
85	8/15/88
86 a-e, g-p	8/15/88
87 a, b	4/15/88
88 b-f	2/15/88
89	6/15/88
90	6/15/88
91	2/15/88
92	2/15/88

Nonserious Item #	Abatement Date
1	2/15/88
2 a - c	2/15/88
3	2/15/88
4 b and c	2/15/88
5	2/15/88
6	2/15/88
7	2/15/88
8 c	2/1/89
9	6/1/88
10	2/15/88
11	2/15/88
12	2/15/88
13	6/15/88
14	2/15/88
15 a, b, d, e, f-2, f-3, g, h, i, j, k, l and m	4/30/88
16	4/30/88
17	3/15/88
18	6/15/88
19	6/15/88
20	4/15/88
21	6/15/88
22	6/15/88
23 a, c, d, e, f, g, h, i, j, k, m, n, o, p, q, r, s, t, u, x, y and z	8/15/88
24	6/15/88

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ANN MCLAUGHLIN, Secretary of Labor, United States Department of Labor, Complainant, v. SCOTT PAPER COMPANY, Respondent, UNITED PAPER WORKERS INTERNATIONAL UNION, Authorized Employee Representative	OSHRC DOCKET NO. 88-550

ORDER

The Settlement Agreement submitted by the parties has been considered and is approved in accordance with its terms.

So ordered.

Richard DeBenedetto
Judge, OSHRC

Dated ____________ 1988
Boston, MA.

ATTACHMENT (QUESTION 12)

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

JUL 7 1987

MEMORANDUM FOR: REGIONAL ADMINISTRATORS

FROM: LEO CAREY, DIRECTOR
DIRECTORATE OF FIELD OPERATIONS

SUBJECT: Compliance Guidelines for Implementing the Field Sanitation Standard

This instructional memorandum provides guidelines for the inspection of agricultural establishments covered by the Field Sanitation Standard - 29 CFR 1928.110. In light of the short amount of time remaining in FY 87 and the significant number of hand labor operations conducted as part of the harvesting process, it is imperative that the information contained in this memorandum be disseminated as quickly as possible. Therefore, an instructional memorandum is an efficient vehicle of communication.

Regional Administrators and Area Directors shall ensure that the procedures covered in this memorandum are adhered to during field sanitation inspections.

This memorandum concerns a new Federal program which affects State programs. Each Regional Administrator shall ensure that this change is promptly forwarded to each State designee. Request State designees to acknowledge receipt of this instructional memorandum. This acknowledgment should include a description either of the State's plan to implement the change or of the reasons why the change will not be implemented for that State. State plan States have 6 months to adopt the field sanitation standard. In those states where a standard has not yet been adopted or is not yet in effect, interim Federal enforcement assistance will be provided through response to complaints.

The new Field Sanitation Standard, 29 CFR 1928.110 will be fully effective on July 30, 1987. The enforcement program will be implemented at the agricultural establishments covered by the Field Sanitation Standard once the standard becomes fully effective.

Traditionally, OSHA has applied its compliance resources in the manufacturing, construction and maritime industries and, therefore, has limited experience in the agricultural sector. Most inspection scheduling procedures outlined in the FOM cannot be used in scheduling inspections of applicable agricultural establishments. These operations tend to be seasonal, and are of short duration in most instances.

Since formal training is not planned for this standard, Regional Administrators shall ensure that an adequate number of CSHOs are familiar with the Field Sanitation Standard and this memorandum in order to conduct their programmed number of inspections. The preamble to the standard will be used as one of the training guides and CSHOs will be familiar with its contents.

The preamble contains a full discussion concerning the record upon which the final standard was justified and based, and OSHA's interpretations and intentions about the meaning of the individual requirements of the standard. In order to ensure an adequate understanding of the final standard and encourage consistent enforcement, particular attention shall be given to the following: Scope; Definitions especially agricultural employer agricultural establishment, and hand-labor operations; accessibility of toilet and handwashing facilities; and requirements for employees working less than 3 hours.

All compliance personnel shall be instructed to look for hand-labor operations in the field when they are in rural areas where such operations are expected to be in progress. Each observation of such operations shall be handled in the following manner. The CSHO making the observation shall inspect the operation if the following are noted:

(1) Apparent violations of the Field Sanitation Standard are observed or circumstances would indicate violations to be reasonably probable; and

(2) It appears that the agricultural employer is covered by the standard.

The above inspections shall be considered programmed inspections. A programmed inspection will not be attempted unless both criteria, (1) and (2) are met. If a significant amount of resources was expended during the observation, but no inspection was conducted due to lack of coverage, an OSHA-1 shall be filled out and marked "No Inspection."

All complaints/referrals received concerning the alleged violations of the Field Sanitation Standard shall be handled as described in the FOM, Chapter IX. However, due to the short durations of these operations it is suggested that the Area Office process the complaints/referrals as quickly as possible given the available resources.

If a denial of entry occurs, a warrant will not be sought in every instance. The Area Director will consider factors such as warrant processing time, anticipated duration of the hand-labor field operation, and impact on compliance before processing a warrant application.

In those instances where a denial of entry is the policy of a given employer, a preinspection warrant should be considered by the Area Director. If a denial of entry occurs, a warrant may not be necessary where the violations are in plain view and sufficient data is collected to support the issuance of a citations.

In those States where the 7(c)(1) enforcement program has responsibility for conducting migrant farmworker camp inspections, they shall also perform inspections under the Field Sanitation Standard.

The following guidelines shall be applied when recording Field Sanitation Standard inspections:

> Current instruction for completing the Inspection Report, OSHA-1, as found in the IMIS Manual and the following instruction shall be used:
>
> (1) The OSHA-1, Item 24 shall be marked as appropriate.
>
> (2) The OSHA-1, Item 25 "National Emphasis Program"will be marked and "FIELDSAN" entered in the "specify field" of all field sanitation inspections.

Finally, please note the field sanitation inspections are NOT National Emphasis Program inspections but the above entry is required due to the lack of an additional field under Item 25 at this time.

References.

1. Field Sanitation Standard - 29 CFR 1928.110.
2. OSHA Instruction CPL 2.45A, April 18, 1983, Field Operations Manual (FOM), Chapter IX.
3. OSHA Instruction ADM 1-1.12A, April 1, 1984, the Integrated Management Information System (IMIS) Forms Manual.

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

JUL 7 1987

MEMORANDUM FOR: REGIONAL ADMINISTRATORS

FROM: LEO CAREY, DIRECTOR
DIRECTORATE OF FIELD OPERATIONS

SUBJECT: Programmed Field Sanitation
Inspections by Region

The field sanitation standard §1928.110 became effective in part on May 30, 1987, and fully on July 30, 1987. An instructional memorandum covering this standard is being distributed concurrent with this memorandum.

The purpose of this separate communication is to present by region the number of field sanitation inspections programmed for FY 88. (See Table I). This memorandum also contains (Table II), the suggested number of field sanitation inspections for each state plan State for FY 88.

The information contained in Table VIII - Estimated Number of Workers Covered (By State) of the final Field Sanitation Standard (52 FR 16074) was considered in deriving the number of field sanitation inspections for each region.

The existing 7(c)(1) programs that are performing migrant farmworker camp inspections will also be responsible for conducting field sanitation inspections. These numbers will be included in the total number of programmed inspections for the respective regions. Appropriate 7(c)(1) funding changes will be accomplished from the National Office using supplemental funding.

The number of inspections for FY 87 will be based on the total targeted inspections for FY 88 for each region.

Attachment

TABLE I

FY 88

Region	Number of Inspections
I	15
II	27
III	28
IV	178
V	29
VI	31
VII	8
VIII	18
IX	317
X	24

Remainder FY 87

Regions	Number of Inspections
I	4
II	7
III	7
IV	45
V	7
VI	8
VII	2
VIII	5
IX	80
X	1

TABLE II

FY 88

Region	State	Number of Inspections
I	Vermont	1
III	Maryland	7
III	Virginia	19
IV	Kentucky	66
IV	North Carolina	91
IV	South Carolina	19
IV	Tennessee	22
V	Indiana	5
V	Michigan	27
V	Minnesota	12
VI	New Mexico	6
VII	Iowa	1
VIII	Utah	3
VIII	Wyoming	2
IX	Arizona	16
IX	Hawaii	34
IX	Nevada	1
X	Alaska	0
X	Oregon	23
X	Washington	60

The **Chairman**. Just before Mr. Baroody, we want to recognize the ranking minority Member, the Senator from Utah, Senator Hatch, for an opening statement.

Senator **Hatch**. Well, thank you, Mr. Chairman. It is really a privilege to be with you today, and I look forward to hearing the testimony of these witnesses. And of course, I have followed the last couple of days very closely.

And, Mr. Chairman, when one reviews the testimony that the Committee received over the last two days of hearings, a few points stand out vividly.

First, we are still having serious problems with the Occupational Safety and Health Administration. When President Reagan was elected in 1980, this country was besieged by Federal regulations.

His commitment to rein in the Federal bureaucracy was widely supported by the American public. Despite the former administration's devotion to regulation, OSHA could not guarantee workplace safety.

It could not guarantee that the courts would approve its regulatory standards.

And it was not able to replace, or should I say it was not able to prevent, workplace injuries and deaths.

Second, OSHA could not do this job by itself then, and it cannot do it alone today. It cannot be everywhere all the time. The bottom line is that employees must be adequately trained.

Employers must be adequately compelled to provide a safe workplace. Employees need to be adequately trained. And OSHA must have the statutory authority it needs to guarantee enforcement of the act.

Thirdly, over the last few days, we have heard serious allegations about the integrity of the regulatory process. Quite frankly, given our hearings on the Mine Safety and Health Administration, complaints about regulatory delays are not surprising.

But I am sure that all of the allegations about OSHA are completely accurate—I should say I am not sure that they are completely accurate.

The **Chairman**. Are you sure?

Senator **Hatch**. I am sure that I am not sure. [Laughter]

But if these allegations that I believe are not completely accurate are found to be true, then it may be time for this Committee to rethink portions of the act itself, and the regulatory process in the Congress, and that we have created in the Congress.

Fourth, one cannot help but be saddened by the fact that OSHA rulemaking is still a creature of litigation. When OSHA finds itself being held in contempt of court, regardless of what it does; when OSHA knows that it will be sued by both companies and unions regardless of the content of a regulation, something is seriously wrong, so wrong that perhaps the problem extends beyond OSHA.

Finally, we need to be careful that OSHA's entire record is accurately presented, not just its mistakes and its shortcomings. Some very informative and constructive testimony has come out of these hearings in the last two days.

But there have also been, I think, some disturbing inferences, such as those concerning Vice President Bush's role as chairman of the President's regulatory relief task force.

In yesterday's hearing, it was implied that the Bush task force on regulatory relief often tried to weaken OSHA health and safety regulations.

It was implied that the OMB, Office of Management and Budget, was the Vice President's handmaiden.

What was not mentioned was how the Vice President personally intervened in 1981 to rescue the Hazard Communication Standard, a standard that we all acknowledge to be one of the most important of all of OSHA's recent rules, a standard that completely comes into effect this May.

When OSHA sent the first draft of this standard to OMB in 1981, OMB objected and asked the Vice President to withdraw the standard. The Vice President resisted OMB and made sure the standard went forward as written.

I hope the final record will reflect these facts, and not be simply a selective collection of inferences designed to justify preconceived conclusions.

Another issue which I found confusing was the line of questioning concerning the Administration's delay in preparing guidelines for protecting workers from AIDS. I had to be a little amused by these questions, because less than 12 months ago, Senator Humphrey and I offered an amendment in this Committee to require OSHA to issue guidelines on AIDS. Less than 12 months ago. Our amendment was defeated by this Committee.

Consequently, I am a little surprised to see OMB being criticized, when the majority on this Committee opposed an amendment that would have required OSHA to issue guidelines on AIDS within one year thereafter. And I think it is a little phony to act like that did not happen.

I was also disappointed to hear some rather harsh statements made about OSHA, statements which I do not believe are supported by the record.

It was said that we should hear today from the officials who, quote, "ordered OSHA's retreat from safety", unquote.

The Reagan Administration was accused of having, quote, "peeled back the thin veil of safety", unquote.

And yesterday's victims panel was described as, quote, "OSHA's victims", unquote.

Now these comments are simply unfair, in view of the progress that has been made in enhancing workers' safety in recent years, and particularly during the tenure of Mr. Pendergrass.

For example, according to the Department of Labor, between 1972 and 1986, OSHA levied fines 19 times, in those 14 years; 19 times they levied fines.

I might add, during Mr. Pendergrass' tenure, there have been—which is a relatively short time—there have been 41 such fines.

In other words, during a 14-year period, only 19; during just the last couple of years, 41.

Between 1971 and 1986, 14 years, there were two fines, only two, of $500,000 or more. Between 1986 and 1988 during Mr. Pendergrass' tenure, there have been 15, 13 more in two years; two in 14 years; 13 more, actually 15, in two years.

And between 1972 and 1986 there were no fines of one million dollars or more. In the last two years there have been eight fines of one million dollars or more.

Of course there have been, but there have also been several important accomplishments, it seems to me, which should not have been ignored. There have been mistakes, but I think we ought to talk about accomplishments as much as we talk about mistakes.

This Administration is interested in having its mistakes pointed out so they can correct them. But I think it is also important to know that there have been a lot of mistakes corrected during this Administration.

Finally, it does not take a rocket scientist to figure out that one of the targets of these hearings happens to be the Office of Management and Budget. We have repeatedly heard how OMB has done everything within its power to muzzle OSHA.

Now, I am not ready at this particular point to pass final judgment on these accusations, but I just hope that if they are going to be made, that the Committee will extend to the Office of Management and Budget the privilege of testifying so they can defend themselves.

If we have not extended that privilege, and I do not believe we have, then we should be condemned for failing to ensure that the hearing record is complete, and more importantly, that the hearing record is fair.

While we point out faults, let us point out the good things, too.

In sum, I look forward to reviewing all of the testimony we will receive over these three days, and to working with my colleagues on the Committee. I hope that by working together, we can develop an appropriate and it seems to me an effective response where Congressional action may be necessary.

But to do so, it seems to me we will need a complete record based on all of the facts, and on the testimony of all of the parties involved in the OSHA rulemaking process.

So I was unable to hear all of your testimony, but I do have a written copy of it. I just want to welcome all of you here today. I appreciate your testimony, and look forward to asking a number of questions as we get further along in the hearing.

I just want the hearings to be fair. I want them to be down the middle. I want us to point out faults where they exist, but I also think we ought to be fair and point out the credible successes that have occurred too.

Mr. Pendergrass, from what I have seen over the last couple of years, I have seen a lot of changes under your administration. They have been for the benefit of workers. And I would hate to see your maligned in any way, except in those areas where we might be able to improve, and where we can point out that there are legitimate questions.

But I appreciate your statement and appreciate having you here, and Mr. Baroody and Mr. White, as well.

Mr. PENDERGRASS. Thank you, Senator Hatch.

The CHAIRMAN. Let me just point out for the record, this Committee has jurisdiction over OSHA. We do not have oversight responsibility of OMB. We are glad to have any of OMB's reactions to any of the statements, comments, or materials that have been put in the record. And as far as I am concerned, I would be glad to have a hearing with OMB later in this month at a time.

But it is very clear, our responsibility is with OSHA. We have a clear responsibility to assess how it is performing. And we are not going to be a gadfly going over all the agencies of government.

We are glad to have OMB's response. We welcome OMB's response, and evaluating their response, will make a decision on whether it would be useful or worthwhile to have any further comments.

Second, we indicated, as the Senator was not here yesterday, that any of the groups, any of the individuals, any of the companies, wanting to respond to any of the testimony given here over the last three days would have their comments included.

And third, regarding the Vice President, it was pointed out in a memorandum from Michael Baroody to Mr. Pendergrass, it said: "On Tuesday the Vice President met with the members of a task force on regulatory relief to discuss the progress of priority regulations and legislation. In its status report and regulation, OMB was critical of the Department of Labor for failing to meet its commitments and deadlines."

We had a lot of testimony about what OMB was doing in watering down many of the existing regulations in that part of the record. But let me continue.

"The Vice President affirmed this, and expressed his personal interest and concern in completing the regulatory agenda established by the task force. He directed each of us to cooperate fully with OMB in completing the task force initiative."

Further down: "OSHA was singled out by OMB for strong criticism for its failure to act expeditiously on methods of compliance."

Senator, I hope you will have the opportunity to read the record on the question of methods of compliance. We are talking about the virtual unanimous opinion, from the industrial hygiene community, that believes that engineering techniques vastly protect the workers more than respirators.

And this memorandum saying OSHA was singled out for strong criticism for failure to act expeditiously. The record shows what position OMB had: to weaken the standard. And the Vice President was at the meeting and making that recommendation.

Now you draw a different conclusion on it, and you can. But I am not going to back away from this document and what it states.

It also continues, although we did not get into it, the carcinogen policy, that's cancer. There is a similar record with regards to OMB on that issue.

And we will examine the record and let it go on. But let us not try to whitewash what is basically an action that has been taken both by OMB and, quite frankly, with both the Vice President's presence and urging.

Now, that is what these documents say. If you can draw a different conclusion, you are welcome. But that is what this document says.

We will proceed——

Senator HATCH. Well, Mr. Chairman, if I could just correct the record on a statement that I did make.

I indicated that there were 19 fines of I think a half a million or more. It was 19 fines of $100,000 or more before 1984, I believe, or '86. And since Mr. Pendergrass has been in, there have been 41 fines, better than double, of $100,000 or more since 1986.

Second, let me just say this. I am not criticizing looking into any problems that may exist. In fact, I am not criticizing this Committee's right to look at OMB. I think if they have played an un-noble role with regard to OSHA, then by gosh, they have an obligation to come here and testify; we have an obligation to listen to them.

I just do not want any shots taken at various people without giving them a chance to testify and to tell their own story.

Memoranda are written by people in a hurry around here, and sometimes they mean what they and sometimes they do not. I am willing to take that one at face value; it does not make any difference to me.

All I want to do is just make sure it is fair. And I think with regard to the Vice President, it is fair to point out that in the criticism there was no attempt to try to balance it with all the good things that he has done with this task force, and in particular, the Hazard Communication Standard, which is a pretty doggone important thing when it comes to the protection of employee rights in America, probably the single most important thing done in the history of OSHA.

And we act as though it does not exist, and the Vice President did not have anything to do with it, as we malign him, and it just makes you wonder if sometimes politics rises above fairness.

And I just want to make sure that—I am not going to accuse anybody of that; of course, this Committee has never been known for politics. But I will say this, that I just want to make sure it is fair, and that is all I am asking for.

And I think if we are going to criticize OMB, hey, they should be hauled in here too, and they should be given an opportunity to explain their attitudes, and their situation.

They have a tough job. Their job is to save money for this country, and to try to get us to live within our means, an almost impossible job, according to most people in this body.

And that job may sometimes encroach on some of these things, and they may have some logical and good explanations for it.

But be that as it may, I appreciate the Chairman's suggestion and willingness to bring them in if they need to come in.

The Chairman. We will have an opportunity, tragically, to see where they have been trying to save money at the cost of lives. That is what I believe the record will show.

Let me just ask you, Mr. Baroody, did you send that memorandum to Mr. Pendergrass? Is that an accurate memorandum that you sent to Mr. Pendergrass?

Mr. Baroody. It is. And if I may point out, Mr. Chairman, what it portrays is the fact that at the meeting I attended, the Vice President was presented with a report on the failure or accomplishments of individual regulatory agencies to meet their stated objectives in terms of deadlines for publication of rules.

The Chairman. Why do we not go on with your testimony?

Mr. Baroody. Thank you.

Chairman Kennedy, ranking minority member Hatch, members of the Committee, my name is Michael Elias Baroody. I am the Assistant Secretary of Labor for Policy.

I also serve as chairman of the Department's Policy Review Board. The board is comprised of all members of the executive staff of the department, which includes every assistant secretary and every agency head.

The board was created in 1985 under then-Secretary Brock in an effort to establish and institutionalize an open and collegial decision-making and advice rendering body to review Department of Labor policies.

There have been 90 meetings of the board since the first was held in January of 1986. Each has been open to all members who cared to attend.

Included among those policies subject to review most certainly are regulatory policies, including, but not limited, to OSHA-rulemaking.

By some measures, at least, our department, with one of the Federal Government's most diverse mandates, is also the largest regulatory agency in the executive branch.

Those of us who came to DOL with Mr. Brock were fortunate to find that as we were arriving, the General Accounting Office was completing a year long management study of the Department.

Even before GAO reported, Mr. Brock asked me to focus attention on the standards development process in all the regulatory agencies of the Department.

The GAO report reinforced in his mind the importance of that request.

GAO made two principal findings of relevance. First, that the department's rulemaking process generally—certainly not just OSHA's, but they made prominent and specific mention of OSHA—needed improvement.

GAO cited especially the, quote, "lack of a comprehensive plan for addressing the issue", close quote. And GAO secondly found that a more systematic planning process was desirable to give the Secretary, quote, "a better framework for clearly articulating his immediate priorities and strategies for dealing with issues and problems requiring a long term focus, such as the rulemaking process."

Secretary Brock determined in response to these recommendations that a representative of the Secretary was to establish and preside over a more centralized process of policy development and coordination.

For almost three years now, it seems like only yesterday, first under Mr. Brock, and more recently, Mrs. McLaughlin, that secretarial representative has been me.

I understand, Mr. Chairman, that put simply, the focus of these hearings will be a look at OSHA's past, at its management, enforcement, and rulemaking history.

With respect to the latter, OSHA rulemaking, I have got a chart that graphically depicts that history by representing the output of final rules, year by year, since the first such rule was promulgated in 1976.

There have been 47 such final rules in all; 20 of these 47 have been published in the last three years.

You are quite right, Mr. Chairman. Of those 20, four were published under court order, or court-imposed deadlines; another one was statutorily required by a date certain; and still others, it is true, were subject to pressures, although not to impose timetables.

Having said that, though, I suggest there is more to say about the matter than just that the court made us do it. And having said all that, there would still be the irreducible fact that 20 of OSHA's total output of 47 final rules have published in the last three years, and that about a dozen of those were done at OSHA's own volition, totally free from the pressures or threat of any externally imposed timetables.

And with that point made, I think, Mr. Chairman, we can all of us agree that 47 rules in 19 years, spanning three administrations of both parties, is probably somewhat less than the original sponsors of the act had hoped for; and that none of us wants to look back 19 years from now on another chart that shows, perhaps, no more than another 47 rules.

And that is especially true if those rules cover no more than an additional 47 individual health and safety threats in the American workplace.

But there are many of us at DOL who do not think that more of the same is, or has to be, the only choice for OSHA. You remarked, Mr. Chairman, during Mr. Pendergrass' statement about his remarking of the absence of vision.

Mr. Hatch, in your opening statement, Senator, you remarked the same, that there was clearly need for improvement in the way that OSHA dealt with its regulatory responsibilities.

We have come to the same conclusions at the Department. Some of us have been thinking about what a new OSHA might look like, or at least, how it might behave, and how it might make rules.

What OSHA rulemaking looks like now on that chart is a series of year-to-year outputs that vary somewhat, but frankly, not very dramatically. If we work harder, perhaps the trend established in these last three years can be locked in and improved on with new——

The Chairman. Mr. Baroody, I do not want to interrupt you, but I am afraid I have to. The Committee has no copies of your testimony.

Mr. Baroody. I agree, sir.

The Chairman. We would like to have your testimony 24 hours before the hearing. You could see, with regards to the exchange with Mr. Pendergrass, it helps us to focus on the points of review.

And quite frankly, I just asked my staff for a copy of it now so I can follow it while you are speaking.

Mr. Baroody. I apologize that it is not here, Senator.

The Chairman. We have not got the testimony. Do you want to just summarize it, then?

Mr. Baroody. Well, I have already read half of it. I would like to go through the rest, if I may, and I appreciate your indulgence.

Some of us have been thinking about what a new OSHA might look like, as I said, or at least how it might behave, and how it might make rules.

Let me just ask if the statement has arrived, to make sure that it is distributed.

What OSHA rulemaking looks like now—well, excuse me. I was making the point that if we work harder, perhaps the trend toward more final rules that has been established in these last three years can be locked in and improved on with new record outputs each consecutive year, and the incremental progress that hard work can always ensure.

The CHAIRMAN. What page are we on now?

Mr. BAROODY. I am on the second page, sir.

I am about to begin a paragraph beginning, "But as Secretary McLaughlin is fond of saying."

The CHAIRMAN. Well, with respect, it is a nine-page statement, and we have not received it, and you are a professional, and you ought to be able to summarize. You have been in this business long enough, so you ought to be able to at least summarize it.

We have not had a chance, with all respect to everyone's time to review your statement. We have got a lot of questions, limited time, and we want to focus on the points of the hearing; we want to hear you; but quite frankly, for you just to read seven more pages to us when we have not had a chance to review it is really a waste of the Committee's time.

Mr. BAROODY. Well, Senator, I am sorry to hear you say that. And with all respect, I was only invited last week.

The CHAIRMAN. So was Mr. Pendergrass only invited last week. We will give you a chance to summarize. You are a professional.

You know, we, as Senators, are used to hearing from people who can speak off the cuff.

But if we are going to have a hearing, we ought to have the professional people that know the subject, or otherwise we are wasting everybody's time.

You know the subject, and I will give you really about six or seven minutes.

Mr. BAROODY. I do not think I need more than that, Senator.

The CHAIRMAN. Okay.

Senator HATCH. Let me just say this: I would prefer to hear the whole statement, since you have prepared it. I wish we did have a copy.

But you are not the first one to come from any administration, whether it is Democrat or Republican, who did not get his statement in on time. It is one of those technical things that happens from time to time. It should have been done, but so what? The important thing is that we get your testimony.

You have taken time to put it in writing. I would like to hear it. But if you could hurry. [Laughter.]

The CHAIRMAN. In other words, read it fast, so we will really get the full gist of it.

Senator HATCH. Well, to make a long story short, I chaired this——

The CHAIRMAN. Go ahead and read your testimony.

Senator HATCH [continuing]. For six years, and all I can say is, in the six years before, I saw in the Carter Administration come up and here—we did not even get testimony some times.

Mr. BAROODY. With all due respect——

The CHAIRMAN. Not with this chairman, though.

Senator HATCH. No, you were not chairman then.

The CHAIRMAN. Well, I am now. [Laughter.]

The CHAIRMAN. We do not want to get into voting. Just continue with your testimony.

Senator HATCH. I am proud of you. I really am. And this is a good system.

Mr. BAROODY. And I apologize. The statement would have been prepared earlier if I had had more notice.

But as Secretary McLaughlin is fond of saying in a different context, the answer lies less in working harder than in working smarter, because if OSHA stays in its accustomed box of full blown 6(b) rulemaking as the normative behavior, and works harder even than humanly possible, then the best we can hope for is a few final rules a year on a few specific toxic substances a year.

In a world where the workplace can have thousands or even tens of thousands of threats in new compounds and chemicals coming on stream all the time, working harder will not be enough.

John and I have spent a good deal of time talking about this. Many of us at Labor have. The look of a new OSHA may not yet be precisely discernible. But with respect to rulemaking, it does not look much like the chart I have presented all.

It looks to me and to John much more like a pyramid. And I would ask you, Mr. Chairman, to indulge me just a little longer, so that I can describe that pyramid to you.

First at the bottom along the base of the pyramid is the Hazard Communication Standard, arguably the single most important rule in OSHA's history, and unarguably the one with the broadest scope of coverage, and the furthest reach into the workplace.

It is a single generic rule designed to do many things, but most simply put, it is designed first and foremost to prevent workplace hazards from becoming worker risks by requiring employers to educate, inform and train their employees on the nature of the substances they deal with, and the proper methods for dealing with them safely.

Second, with hazard communication as the foundation, the body of the pyramid above would be comprised of certain other generic rules.

The PEL project is already well underway, and is in fact, under John Pendergrass, OSHA's first and most immediate priority. For those unfamiliar with the PEL, John has described it, it would in fact set new exposure limits for some 600 substances, about a third of which have never before been regulated by OSHA.

The body of the pyramid might expand to include other generic rules in areas such as medical surveillance and medical monitoring, but only after we have conducted significant research into the effectiveness of such devices in current and existing OSHA rules.

In addition is a final, large block to fill in the body of pyramid, would be an effort to explicitly seek to address the contentiousness that seems now inherent in OSHA rulemaking, but that I think can be reduced, if not ultimately put behind us.

I read the testimony Monday that was critical of negotiated rulemaking. The witness might be surprised, or maybe not, to know that his categorical dismissal of negotiated rules is similar to the dim view OMB takes of them.

The remaining block of my pyramid, however, is not negotiated but mediated rules. And the difference between the two is substantial, not semantic.

Negotiated rulemaking has come to mean a process whereby workers and employer interests come together and negotiate agreement among themselves and deliver the product of their negotiations as a proposed finished product to the government.

The premise of such an approach suggests falsely that there are only two interested parties, workers and employers. But the public interest, represented by government, needs to be represented at the negotiating table as well, not just to receive and bless a final product, but to mediate and guide the developmental process from the start.

So the pyramid would have at its base the Hazard Communication Standard. As its body, the PEL project and other similar generic rules. And as a third element, at the tip of the pyramid, there would be room for those rules OSHA singled out as unsuitable for treatment generically, or of greatest importance; or as for whatever reason deserving a priority treatment, and needful of the special scrutiny and detailed demanding, and yes, time consuming and resource intensive rulemaking process that full blown substance specific 6(b) rulemaking has come to mean.

The pyramid shape of a new OSHA can, I think, be drawn more precisely. But if the general outlines appeal to you on the Committee, I would hope we could work together to sketch it in more detail.

We intend to continue at the Department filling in the blueprint, and moving those blocks of the pyramid into place as we can, blocks such as hazard communication and the PEL project.

We could continue more effectively with your support and constructive criticism than without it. We would hope not to have to try to do it without that.

To close the thought, I would observe simply that this pyramid I have sketchily described is, I think, quite responsive to much of the sentiment you've heard in the last two days of testimony.

It relies more on generic rulemaking, which many witnesses have favored. Of more importance to me, it would allow OSHA to set and more certainly stick to its own priorities.

It is consistent with the general thrust of the Administration's regulatory policy, and indeed, it would make OSHA itself more performance oriented. And at the same time, it is, I hope, responsive to many concerns of this committee.

It is only a concept; it is not even complete. But it is at least coherent. It is practical. And therefore, I think it is promising.

It has the added virtue, in my view, of being consistent with current law. And it is not inconsistent with parts, at least, of a statement by the executive council of the AFL-CIO, which called last February for strengthened standard setting, for generic standards, and for strict enforcement regardless of legislative changes.

During the balance of these hearings I know that your questions will more likely focus on OSHA's past. I appreciate this opportunity to focus some on the look of a possible OSHA future.

Thank you.

[The prepared statement of Mr. Baroody follows:]

TESTIMONY OF
MICHAEL E. BAROODY
ASSISTANT SECRETARY OF LABOR FOR POLICY
BEFORE THE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE'S
OVERSIGHT HEARINGS ON THE
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
APRIL 20, 1988

Chairman Kennedy, Ranking Minority Member Hatch, Members of the Committee, my name is Michael Elias Baroody. I am the Assistant Secretary of Labor for Policy.

I also serve as Chairman of the Department's Policy Review Board. The board is comprised of all Members of the Executive Staff of the Department -- which includes every assistant secretary and every agency head. The board was created in 1985, under then Secretary Brock, in an effort to establish and institutionalize an open and collegial decisionmaking and advice-rendering body to review Department of Labor policies.

There have been 89 meetings of the board since the first held in January of 1986. Each has been open to all Members who care to attend. Included among those policies subject to review most certainly are regulatory policies, including but not limited to OSHA rulemakings.

By some measures at least, our Department -- with one of the federal government's most divrse mandates -- is also the largest regulatory agency in the Executive Branch.

Those of us who came to DOL with Mr. Brock were fortunate to find that as we were arriving, the General Accounting Office was completing a year-long management study of the Department.

Even before GAO reported, Mr. Brock asked me to focus attention on the standards development process in all the regulatory agencies of the Department. The GAO report reinforced in his mind, the importance of that request. GAO made two principal findings of relevance:

> First, that the Departmental rule-making process generally, not _just_ OSHA's -- but they made prominent and specific mention of OSHA -- needed improvement. GAO cited especially the "lack of a comprehensive plan for addressing the issue;" and,
>
> Second, that "a more systematic planning process" was desirable to give the Secretary a "better framework for clearly articulatinig his immediate priorities and strategies for dealing with issues and problems requiring a long-term focus, such as the rule-making process."

Secretary Brock's response was two-fold: first, the then Under Secretary was to develop a centralized Departmental management system and, second, a representative of the Secretary was to establish and preside over a more centralized process of policy development and coordination.

For almost three years now, first under Mr. Brock and more recently Mrs. McLaughlin, that secretarial representative has been me.

I understand, Mr. Chairman, that put simply, the focus of these hearings will be a look at OSHA's past -- at its management, enforcement and rulemaking history.

With respect to the latter, OSHA rulemaking, I've got a chart that graphically depicts that history by representing the output of final rules, year by year, since the first such rule was promulgated in 1976.

There have been 47 such final rules in all -- twenty of these 47 have been published in the last three years. And you're quite right -- four of those were published under court-imposed deadlines, another one was statutorily required by a date certain and others were subject to pressures, though not imposed timetables. Having said that, though, I suggest there's more to say about the matter than just that the "Court made us do it." And having said all that, there would still be the irreducible fact that 20 of OSHA's total output of 47 final rules have been published in the last three years and that about a dozen of those were done at OSHA's own volition, totally free from the pressures or threat of externally imposed timetables.

And, with that point made, we can all of us agree, I think, that 47 rules in 19 years -- spanning three Administrations of both parties -- is probably less than the original sponsors of the Act had hoped for, and that none of us wants to look back 19 years from now on another chart that shows perhaps no more than another 47 rules, especially if those rules cover no more than an additional 47 individual health and safety threats in the American workplace.

But there are many of us at DOL who don't think "more of the same" is or has to be the only choice for OSHA. Some of us have been thinking about what a new OSHA might look like -- or at least how it might behave -- how it might make rules.

What OSHA rulemaking looks like now, on that chart, is a series of year-to-year outputs that vary somewhat but frankly not dramatically. If we work harder, perhaps the trend established in these last three years can be locked in and improved on with new record outputs each consecutive year and the incremental progress that hard work can usually assure. The truth is, Mr. Chairman, that OSHA needs to be judged, in the final analysis, not on the number of rules published, but on the amount of worker protection it secures.

But as Secretary McLaughlin is fond of saying in a different context, the answer lies less in working harder than in working smarter. Because if OSHA stays in its accustomed box of full-blown 6(b) rulemaking as the normative behavior -- and works harder even than humanly possible -- then the best we can hope for is a few final rules a year on a few specific toxic substances a year. In a world where the workplace can have thousands -- even tens of thousands -- of threats and new compounds and chemicals coming on stream all the time, working harder won't be enough.

John and I have spent a good deal of time talking about this. Members of our staffs too, have given it thought. And it has been discussed and refined through that collegial and open policy process I described at the outset as well, so that many of our colleagues at the Department, though not directly iinvolved with OSHA, have had the opportunity to have input, to question and to contribute.

The look of a new OSHA may not yet be precisely discernible. But with respect to rule-making, it doesn't look much like the chart I've presented at all.

It looks to me -- and to John -- much more like a pyramid and I would ask you Mr. Chairman to indulge me only a moment or two more so I can describe that pyramid to you:

First, at the bottom, along the base of the pyramid, is the hazard communication standard, arguably the single most important rule in OSHA's history and unarguably the one with the broadest scope of coverage and the furthest reach into the workplace. It's a single generic rule designed to do many things but, most simply put, designed first and foremost to prevent workplace hazards from becoming worker risks by requiring that employers educate, inform and train their employees on the nature of the substances they deal with and the proper methods for dealing with them safely.

Second, with Hazard Communication as the foundation, the body of the pyramid above would be comprised of certain other generic rules. The PEL project is already well underway and is in fact, under John Pendergrass, OSHA's first and most immediate priority. For those unfamiliar with the PEL (or permissible exposure limit) project, it would in a single, unified rule-making, propose to set new exposure limits for about 600 toxic substances in the workplace, about a third of which are currently not regulated at all and the balance of which have been unchanged since first adopted as consensus standards back in the beginning of the 1970's and have fallen significantly out of date.

The body of the pyramid might subsequently expand to include other generic rules, perhaps in the areas of medical surveillance and monitoring though I believe that we should spend a fair amount of time and resources on evaluating experience with these requirements in existing OSHA rules before deciding how, or even whether, to attempt generic rulemaking in these areas.

In addition, as a final large block to fill in the body of the pyramid, would be an effort to explicitly seek to address the contentiousness that seems now inherent in OSHA rule-making but that I think can be reduced, if not ultimately put behind us. I read the testimony given Monday that was critical of negotiated rulemaking. The witness might be surprised -- or maybe not -- to know that his categorical dismissal of negotiated rules is similar to the dim view OMB takes of them. The remaining block of my pyramid, however, is not negotiated but mediated rules. And the difference between the two is substantial, not semantic. Negotiated rulemaking has come to mean a process whereby worker and employer interests come together, negotiate agreement among themselves and deliver the product of their negotiations, as a proposed finished product, to the government. The premise of such an approach suggests falsely that there are only two interested parties, workers and employers. But the public interest, represented by government, needs to be represented at the negotiating table as well, not just to receive and bless a final product but to mediate and guide the developmental process from the start.

So, we would put hazard communications at the base of the pyramid, generic approaches such as the PEL project above it, and as the THIRD element, at the tip of the pyramid, there would be room for those rules OSHA singled out as unsuitable for treatment generically, or of greatest importance, or as, for whatever reason, deserving of priority treatment and needful of the special scrutiny and detailed, demanding and, yes, time-consuming and resource intensive rulemaking process that full-blown and substance specific 6(b) rule-making has come to mean.

Mr. Chairman, Senator Hatch, it is said that if the population of China marched by a given spot in a line four abreast, the line would never end because of the number of additions being constantly added at the end of the line. So is it true of OSHA rules -- particularly OSHA health rules -- if the best we can do is just work harder. We need to work smarter.

The pyramid shape of a new OSHA can, I think, be drawn more precisely but if the general outlines appeal to your Committee, I would hope we could work together to sketch it in more detail. We intend to continue at the Department -- filling in the blueprint and moving those blocks of the pyramid into place as we can, such as Hazard Communication and the PEL project. We could continue more effectively with your support and constructive criticism than if we have to proceed without it. We would hope not to have to try.

To close the thought, I would observe simply that this pyramid I have sketched out is, I think, quite responsive to much of the sentiment you've heard in the last two days of testimony. It relies more on generic rulemaking which many witnesses favor; of more importance to me, it would allow OSHA to set and more certainly stick to its own priorities. It is consistent with the general thrust of this Administration's regulatory philosophy -- it would make OSHA itself more performance oriented -- and, at the same time, it is, I hope responsive to many concerns of this Committee. It is only a concept; it is not even complete. But it is at least coherent and I believe it is practical and therefore also promising. It has the added virtue, I would say, of being consistent with current law. It is not inconsistent with a statement by the Executive Council of the AFL-CIO which called last February for strengthened standard setting, for generic standards, and strict enforcement -- regardless of legislative changes.

On a final note, Secretary McLaughlin would expect me, I think, to mention her own interest in enforcement. As you know, OSHA is not the only law enforcement agency at Labor. I said at the start we have one of the most diverse mandates of any Department in the Executive Branch and what that means more specifically is that we enforce about 130 different statutes. The Secretary took note, soon after she arrived, that it's been a very long time indeed since anyone has looked at our enforcement practices to determine if there are strategies deployed that can maximize compliance and the utilizaton of resources. She has established a task force at the Department, headed by the Deputy Secretary, involving all the relevant agency heads, and substantially engaging the Solicitor and his office, to look closely at enforcement Department-wide, so that we can at least leave behind recommendations for those who will follow, if not more materially improve enforcement strategies and effectiveness before the end of this year and this Administration.

During the balance of these hearings, I know that your questions will more likely focus on OSHA's past. I appreciate this opportunity to focus, if only briefly, on the look of a possible OSHA future. Thank you.

The CHAIRMAN. Thank you very much, Mr. Baroody. We will go through a 15-minute question round.

On the question of numbers and statistics, I want to deal with this quickly and then move on to more substantive matters, but I think it is important to find out at least what the figures are. As anyone knows who has reviewed this, it is not the numbers themselves that matter, it is the quality of the enforcement.

Regarding standard setting, the fact is that there have been some standards issued that are significant, but I believe the record should show that those standards were the result of court orders because OSHA did not move. Regarding enforcement activity, if you look at those numbers, they are listed in Mr. Pendergrass' testimony, and although I believe they are of some use and some value, they should be evaluated in terms of the testimony the Committee heard on Monday from the National Academy of Science about the poor quality of the data.

On the question of the figures, I think it is that the Committee knows whether the number of deaths are up, whether the number of accidents are up, or whether deaths are down, or inspections are up—so we have some kind of idea of what is happening in the agency.

As you know, Mr. Pendergrass, because the Congress felt that there was significant under-reporting by industries, we did have the National Academy of Sciences review the way OSHA was collecting statistics. As a result of that review by the Academy of Sciences, using some of the best statisticians in this country, they made their report.

I am not going to review the report completely, but let me just highlight parts of it:

> In 1984, because of concerns of possible under-reporting of workplace injuries, arising in part from an OSHA policy that exempted employers from routine safety inspections on the basis of injury records

You have heard a lot about this this afternoon

> Congress appropriated funds in OSHA's budget earmarked for the Bureau of Labor Statistics to assess the quality of its annual survey on occupational injuries and illnesses.

Then it continues:

> First, the BLS data systems in their current form are inadequate to provide OSHA with the data it needs for maintaining an effective program for the prevention of workplace injuries and illnesses. Even if the current BLS data systems are modified, they would be unable to measure the rate of occurrence of occupational illnesses. No adequate evaluation of the extent of under-reporting or over-reporting of occupational injuries have been conducted. The panel found it rather startling that an agreed-upon method has not been devised to estimate a phenomenon as basic as traumatic death in the workplace.

And then it goes on:

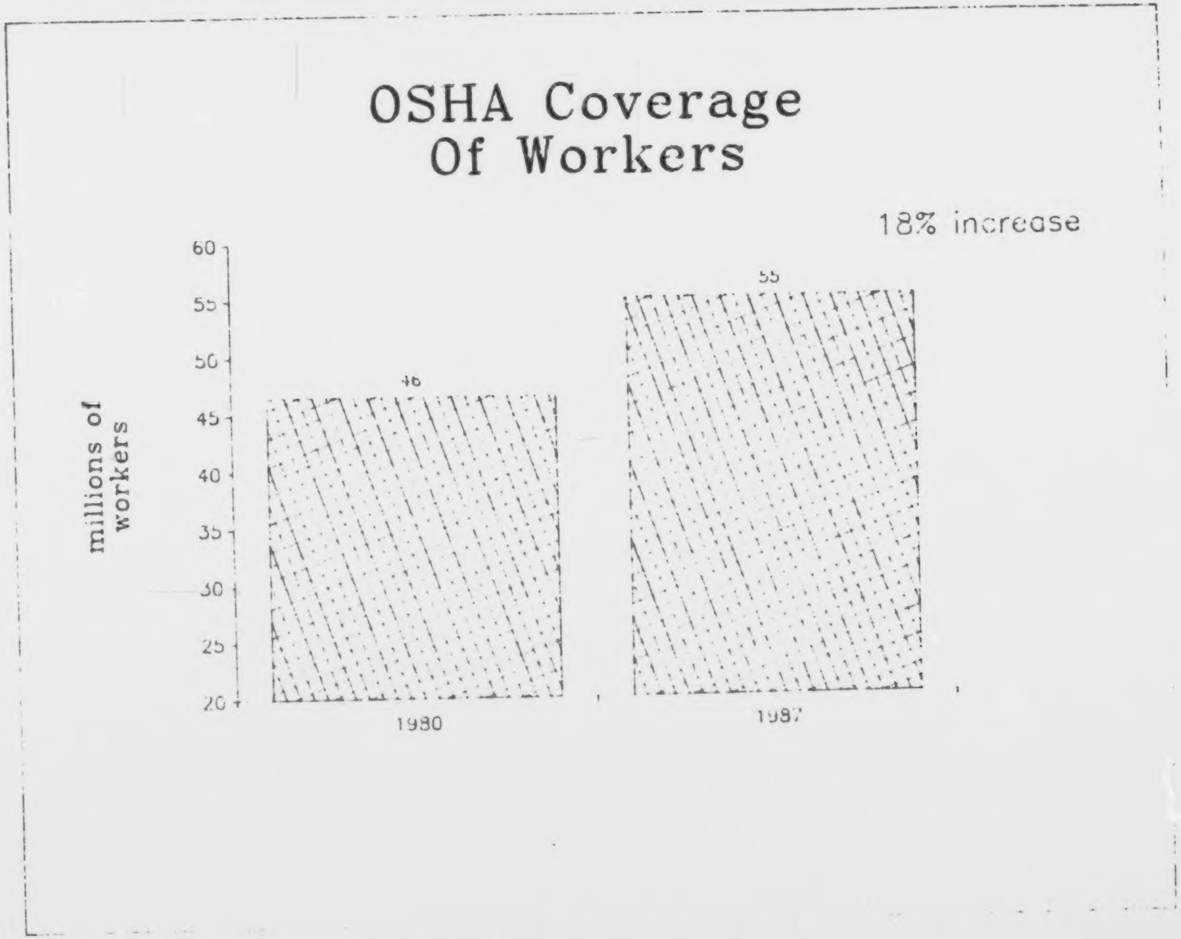
> In discussing some of the problems with the members of the OSHA staff, some of the staff members themselves expressed the need for certain data and the inability of obtaining that information from their own system.

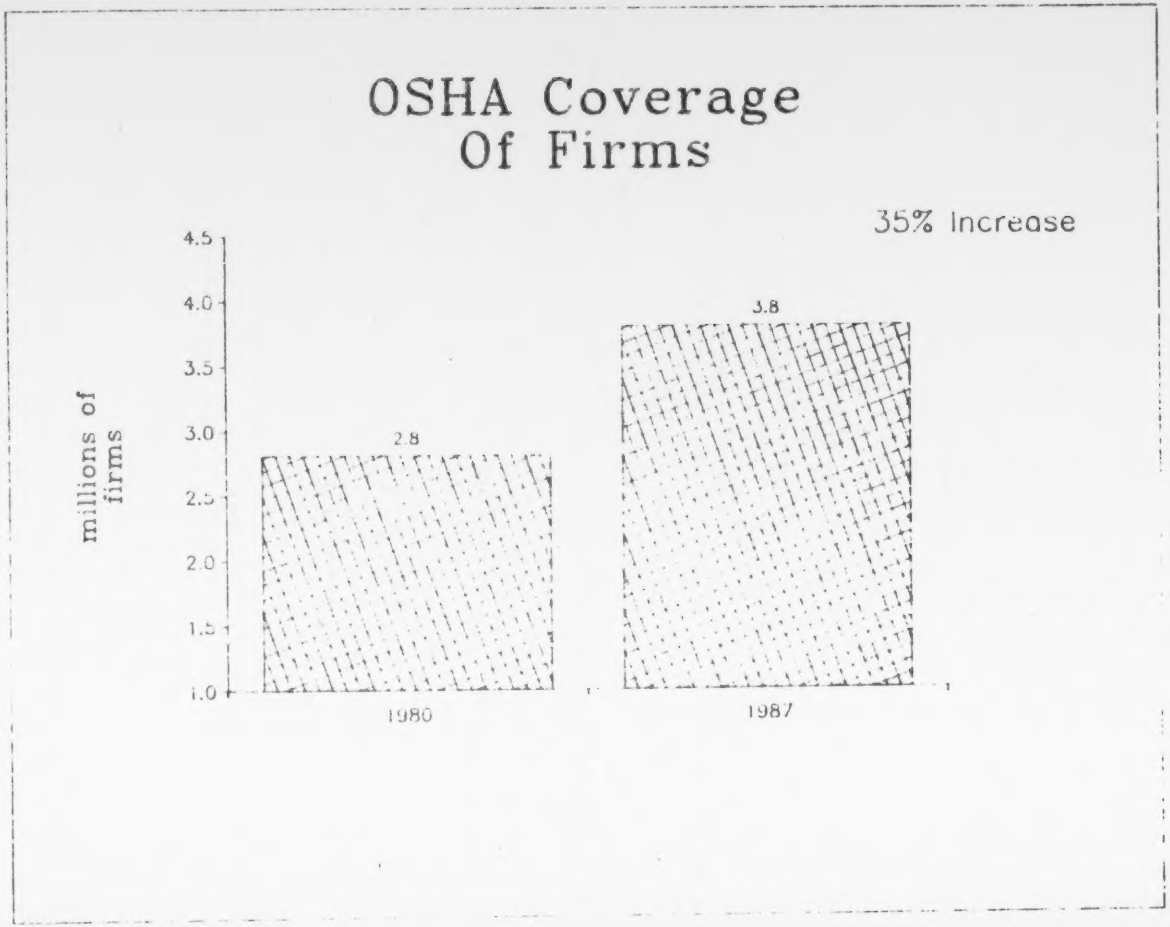
So I would hope that you would review your own way of making these calculations and of drawing conclusions from the facts that you pointed out. I do think that you have to review the procedures which are currently being followed.

Let me go on. As I understand, OSHA's coverage of workers increased from 1980 to 1987, so you have a significant increase, an 18 percent increase, in the number of OSHA covered workers. And in terms of the number of firms, it has gone up actually 35 percent in 1987.

Does that seem to be accurate as far as you are concerned? Those are your figures.

[Information supplied follows:]


OSHA Coverage
Of Workers
18% increase
millions of workers
60
55
50
45
40
35
30
25
20
46
55
1980
1987


OSHA Coverage
Of Firms
35% Increase
millions of firms
4.5
4.0
3.5
3.0
2.5
2.0
1.5
1.0
2.8
3.8
1980
1987

Mr. **Pendergrass**. I do not know.

The Chairman. Can we put up the next chart? If you take OSHA enforcement activity—and this is based upon your own statistics on the percentage of change in the inspections, dealing with the establishments, the health, the accident, in manufacturing—you see significant reductions from 1980 to 1987. Even though there has been a significant increase in the number of workers being covered by the Act, and a significant increase in the number of firms, you see a decrease in the number of inspections all the way down the line. In the number of violations, willful and serious, reductions in terms of willful violations, 57 percent, and serious violations by 13 percent.

The number of penalties, if you translated that from $25 million and estimated based on the value of the dollar, where you have $25 million in 1987, it would obviously be up significantly in terms of the value of the dollar.

Employees covered by the inspections, significant reductions, 33 percent reductions.

Look at the time spent on inspections. Safety, 16 hours spent in 1987, 11 hours. Health, 41 hours, and in fiscal year 1987, 32 hours.

In listening to the inspectors themselves who talked about the time it takes to do a thorough and competent evaluation in the areas of health and safety, they have all indicated and testified that the kind of hours, in safety, 16 or 41 hours is much closer to the time required to have the kind of competent review that is necessary.

First of all, do these charts look accurate to you, Mr. Pendergrass?

[The chart referred to follows:]

OSHA ENFORCEMENT ACTIVITY

	FY 80	FY 87	Percent Change
Inspections:			
Establishment	63,363	59,071	-7
Health	11,871	9,722	-18
Accident	2,286	1,458	-36
Complaint	16,093	9,743	-39
Manufacturing	27,224	17,384	-36
Violations:			
Willful	1,238	529	-57
Serious	44,645	36,982	-13
Penalties:	$25.5 million	$24.5 million	-4
Employees covered by inspections	3.67 million	2.46 million	-33
Time spent on inspections:			
Safety	16 hours	11 hours	-31
Health	41 hours	32 hours	-22

Mr. PENDERGRASS. Well, there is a figure there that I have some difficulty with, and this is in the penalties for 1987, where you have $24.5 million. My figures say that that is over $40 million.

The CHAIRMAN. Well, we would be glad—these are all provided, and we will put them into the record.

Mr. PENDERGRASS. I do not have the details on the number of hours spent. I think what is——

The CHAIRMAN. Well, take a look at the chart.

Senator HATCH. They are $15 million more.

Mr. PENDERGRASS. Yes, yes. I do not know——

The CHAIRMAN. Yes, but in terms of the rest of it, it remains unchallenged.

Now——

Mr. PENDERGRASS. No, Mr. Chairman, I am not leaving it unchallenged. I do not happen to have with me the figures to compare all the others.

Senator HATCH. Did our staffs provide you with this in advance so you could review it—

The CHAIRMAN. The Senator will have his chance at questioning.

Mr. PENDERGRASS. This is the first time I have seen this.

Senator HATCH. Do you mean we did not provide it in advance?

The CHAIRMAN. They provided, Senator, and you will have your chance at questions. That is the way even you did it when you were Chairman.

Senator HATCH. Oh, I agree, I agree. [Laughter.]

The CHAIRMAN. So you will have your opportunity to permit Mr. Pendergrass to try and make a best case out of a poor case, but let's just recognize that these are statistics and figures that have been made available to the Committee and have been made available to the Senator from Utah.

Senator HATCH. Who made them available? Are these CRS, or what? What are they?

The CHAIRMAN. No. They are OSHA's figures.

Senator HATCH. Oh, they are?

The CHAIRMAN. If you had been around here the last couple of days, you would know. Could we go on?

Senator HATCH. Wait. Mr. Pendergrass, do you say they are not OSHA's figures?

Mr. PENDERGRASS. Well, not the $24 million; that was not our figure.

Senator HATCH. And you don't know about the others.

Mr. PENDERGRASS. But I am advised that they are probably fairly close to accurate.

The CHAIRMAN. All right. Is the number of employees who actually received the benefit of OSHA inspection in their workplace down 33 percent from 1980, as the OSHA figures on the chart indicate?

Mr. PENDERGRASS. I do not know. (Conferring with Mr. White.) We do not know.

The CHAIRMAN. Well, do you have any comment about the average amount of time an OSHA inspector spends on a safety inspection? Does that look accurate?

Mr. WHITE. Mr. Chairman, if I might, those are accurate numbers; however, I think they in part, particularly with respect to the safety inspections, reflect the increase in construction inspections, which do take somewhat less time than inspections in the manufacturing sector.

There was a greater proportion of manufacturing to construction inspections in 1980, and in 1987, we are doing more construction inspections, and therefore the average hours per inspection would go down.

I guess I would also note that with respect to the hours spent on health inspections, you heard testimony yesterday that suggested that at least one OSHA compliance officer thought that that number of hours per inspection was too great to do a good job, but it is an accurate reflection of the number of hours spent.

The CHAIRMAN. No, no. The record will stand. That is not what they said. They said there are certain types that are very simple that they can do in a shorter period of time. That is what they testified to, and they then indicated in longer testimony what was really essential and necessary.

I want to keep moving, but I will let the record stand.

Mr. PENDERGRASS. If I may, Mr. Chairman, with regard to the number of inspections, I think the type of inspections conducted has been different in 1987 as to 1980. We have spent a great deal of time——

Senator HATCH. Mr. Pendergrass, could you move your microphone closer, please?

Mr. PENDERGRASS [continuing]. Excuse me—we have spent a great deal of time in the past two years in major plants that take longer to do, so we do not get as many inspections done.

Mr. WHITE. Let me add one other point. You are asking questions about the accuracy of the chart, and while we did generally suggest that they are accurate, if you separate out the numbers of hours spent on construction inspections in safety and the number of hours spent in manufacturing inspections in safety, those hours have in fact gone up since 1980; the hours per inspection in both those types have gone up. It is true that the average has gone down.

The CHAIRMAN. Well, I would be glad to compare those, because we had two field officers who commented about the amount of time that they spent on construction sites. Two of them said that in a three-day period, one inspector and a trainee had 41, 42 or 43 inspections—in three days.

I would like to move ahead, because——

Mr. PENDERGRASS. I would like to comment on that, Mr. Chairman, because that was a very disturbing statement that was made.

The CHAIRMAN. I would think it would be.

Mr. PENDERGRASS. That certainly is not in accordance with policy, either from the national or the regional offices. It is disturbing to me that compliance officers would take action which implies at least that there is advance notice of inspection being given, which is absolutely forbidden by the Act, as well as by the policies that we carry out.

We intend to investigate those allegations to determine as best we can what the facts actually are, and we appreciate the opportunity that you have given us to know about that incident.

Mr. WHITE. We do know, Senator, that those incidents are not reflective of overall practice, and we can supply you data which I think will indicate that.

The CHAIRMAN. Well, we would be glad to hear that, because the testimony is very clear that the individual inspectors felt pressured by the regional offices, and we just didn't have this from one regional office, we had it from others.

But let me go back now to the questions about the compliance officers.

How many compliance officers does OSHA have?

Mr. PENDERGRASS. We have 1,038, I believe is the number.

The CHAIRMAN. And how many compliance officers are industrial hygienists?

Mr. PENDERGRASS. About 450.

The CHAIRMAN. And how many compliance officers are safety inspectors?

Mr. PENDERGRASS. The rest of them would be safety inspectors.

Mr. WHITE. It looks like, as of 1988—this would be February, I believe—we had 470—no, that is budgeted positions onboard—615 safety and 423 health as of 12-31-87. As of the end of February 1988, 658 safety, 442 health.

The CHAIRMAN. And how many of the compliance officers are safety inspectors?

Mr. PENDERGRASS. Six hundred fifty-eight.

The CHAIRMAN. Well, there is a document here which I believe came from your Management Information System, dated March 1st, 1988, covering the period ending in December of 1987, and that document shows 420 safety inspectors and 235 industrial hygienists, for a total of 655 inspectors.

[Information supplied for the record follows:]

NUMBER OF COMPLIANCE OFFICERS HELD BY OSHA AS OF THE END OF MARCH 1988

At the end of March 1988, OSHA had 1,164 compliance officers on board. My response of 1038 referred to December 1987 on-board figures and did not include 56 "11(c)" discrimination investigators that OSHA had on board at that time. I wish to point out that OSHA has consistently included 11(c) investigators in its count of compliance officers.

The count of OSHA compliance officers for the months of December 1987 through March 1988 follows:

	Dec. 1987	Jan. 1988	Feb. 1988	March 1988
Safety	615	641	658	668
Health	423	429	442	443
11(c)	56	55	53	53
Total	1094	1125	1153	1164

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OSHA REPORT PVA-1N                   PLANNED VS ACTUAL RESOURCE ALLOCATION REPORT                                  MAR  1, 1988
NATIONAL                                AREA OFFICE ACTIVITY - NON-TRAINEES                                        PAGE    2

== FEDERAL ACTIVITY ==                          OCT 1987 - DEC 1987

                                 ****************** PLANNED ******************  ****************** ACTUAL ******************
                                 *** SAFETY ***   *** HEALTH ***  *** OTHER ****  *** SAFETY ***  *** HEALTH ***  *** OTHER ****
                                 % TOT    UNITS   % TOT   UNITS   % TOT   UNITS   % TOT   UNITS   % TOT   UNITS   % TOT   UNITS
                                  HRS              HRS             HRS             HRS             HRS             HRS
  B.COMPLIANCE ASSIST (FULL SVC)   5.4              5.4             2.7             3.6             5.2              .2
    1.EMPLOYEES/UNIONS                                                              1.4             1.8
    2.EMPLOYERS/ASSOCIATIONS                                                        1.2             1.6
    3.PROF GROUPS/GENERAL PUBLIC                                                    1.1             1.8              .1
    4.
  C.NO INSPECTION CONDUCTED        2.2              1.1                             2.8   1185      1.7    205       .4       6
  D.FEDERAL AGENCY PROGRAMS                                                          .2              .1
    1.MONITORING AND EVALUATION
    2.TECH ASSIST AND CONSULTATION                                                   .1              .1

TOTAL FEDERAL COMPLIANCE PROGRAM  77.9             77.3             4.1            76.2            70.3            17.3

PROGRAM SUPPORT ACTIVITIES

III.TRAINING                       9.3              9.3             1.9             6.0             8.1            69.9
  A.FORMAL TRAINING                                                                 2.9             3.5            22.7
  B.FIELD TRAINING                                                                  3.0             4.3            47.2
  C.INSTRUCTING OSHA EMPLOYEES                                                       .1              .2

IV.OTHER SUPPORT ACTIVITIES       12.8             13.1            21.3            17.8            21.6            12.8
  A.CALIBRATION/TEST/RESEARCH                                                        .1             2.0
  B.OTHER TECHNICAL SUPPORT                                                          .1              .2              .2
  C.SUPERVISORY DUTIES                                                              4.1             5.5              .5
  D.ADMINISTRATIVE DUTIES                                                           7.9             7.7            11.9
  E.PROFESSIONAL DUTIES                                                             5.6             6.1              .3
  F.

TOTAL PROGRAM SUPPORT ACTIVITIES  22.1             22.4            23.2            23.8            29.7            82.7

TOTAL RESOURCES
  A.TOTAL AVAILABLE HOURS    236397.8         141012.4         59928.0        188087.8        106530.6          4203.0
  B.TOTAL HOURS REPORTED                                                       233809.3        129649.6          4768.0
================================
  C.NBR SAFETY COMPLIANCE OFFICERS   520.7                                        420.3
  D.NBR SAFETY COMPLIANCE TRAINEES    56.7                                         55.1
  E.NBR INDUSTRIAL HYGIENISTS        310.6                                        235.5
  F.NBR INDUSTRIAL HYGIENISTS TRN     89.4                                         84.0
  G.NBR OTHER PROFESSIONALS          132.0                                          9.2
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Mr. **White**. That is wrong.

The **Chairman**. Well, I have got it right here. It is from your own agency. I have it right here. We will make it a part of the record.

Mr. **Pendergrass**. What was the date of that, Senator?

The **Chairman**. March 1, 1988.

Mr. **Pendergrass**. Well, the figure that we have for February 29th of 1988, which should not be different, is that we have onboard 658 safety compliance officers and 442 health compliance officers.

Mr. **White**. These are the numbers we submitted in——

The **Chairman**. Are you counting trainees?

Mr. **Pendergrass**. No, sir.

The **Chairman**. Or supervisors?

Mr. **Pendergrass**. The supervisors who do compliance work are included in our number, yes.

The **Chairman**. Well, did you testify on February 2, 1988 that as of the first of the year, you had 1,038 inspectors?

Mr. **Pendergrass**. That is right.

The **Chairman**. Well, why are these figures inaccurate, then, if they come from your own office? There is a big difference, Mr. Pendergrass. You have made a point about whether you have got adequate numbers of personnel; you have gone to Congress before, not long ago, indicating you had plenty of personnel.

I do not believe the statistics you have in terms of inspections and compliance is worth a darn. And now, we have a confusion about your own numbers of inspectors, using your own material. This is your document here, and we would be glad to share it with you. And why it is inaccurate is something very difficult for us to understand. We do not want to get into the question of misleading the Congress about the number of inspectors at OSHA but that could be implied. Mr. Pendergrass, there was testimony yesterday by three of your compliance officers from two different OSHA offices about the constant pressure on them to produce more numbers of inspections. There was also testimony about quotas imposed by the national office.

Isn't the reason for the pressure for the numbers the fact that they just do not have enough inspectors to meet the quotas?

The compliance officer who testified yesterday said the pressure for numbers was called "the numbers game". They said the result was quantity rather than quality. And we heard astounding testimony yesterday from two compliance officers from the Irving, Texas office, an industrial hygienist who said she had done an inspection of a construction project; that she was sent out with a safety inspector to such a project merely to double the number of inspections. She said that between them, they did 50 inspections in a few days.

And a safety inspector from your Irving office testified that he and three other inspectors were instructed to go to a large construction site, and they were told to obtain just enough information to complete the OSHA-1 Form, which opens an inspection, go back to the office and get numbers into the system, then go back and make the inspection later. He said the four of them entered 48 inspections which had not yet been entered into the system.

If that is so, doesn't that amount to advance notice, which is basically illegal?

Mr. Pendergrass. Mr. Chairman, when this was brought up just a few minutes ago, I expressed my great concern about the testimony of those people and the implication that this could constitute advance notice. The allegations are serious, and we will look into them, because this is not according to policy.

Mr. White. And let me add, Senator, in terms of what our instructions to our compliance officers were, it is true that we have inspection goals and that we provide those goals to our regional offices, and they are expected to the extent possible to meet those goals.

But we provided an instruction to the regional offices in May which specifically said: "We want to stress the fact that this request is not intended to imply that we want you to make any changes in your current inspection emphasis, procedures or targeting mix for the sole purpose of increasing inspections during the remainder of fiscal year 1987."

We provided that instruction explicitly to the field. We have continually emphasized the need for quality of inspections. And from our perspective, it is certainly a "numbers game".

The Chairman. Just to clear this point—and I will yield then to Senator Hatch, since I am up to the 15 minutes now—because I want to end with it. As I understand, OSHA told Congress on February 2nd, 1988, safety inspectors, 615, health inspectors, 423, for 1,038 inspectors.

Mr. White. That's exactly right.

The Chairman. And the internal document—you have a copy of it—OSHA's internal data says you had 420 inspectors, 55 trainees, for 475; you had 235 inspectors and 84 trainees, for 319.

You testified that you had 1,038; your document said 794. The question is: Why?

Mr. Pendergrass. I would have to see the document, if we may.

Mr. White. It does include trainees. You are correct. Our number, the numbers of 615 and 423, includes trainees. It also includes——

The Chairman. Well, you just told me it didn't, a minute ago.

Mr. White. No, I did not tell you that, Senator.

Mr. Pendergrass. I did.

The Chairman. Mr. Pendergrass did.

Mr. Pendergrass. Yes.

The Chairman. So one is yes, one is no.

Mr. Pendergrass. May I?

The Chairman. Yes.

Mr. Pendergrass. The number includes trainees, which actually covers as much as three years, but people who are doing inspections, not at the rate of a journeyman.

The Chairman. Can they conduct them alone?

Mr. Pendergrass. No. They will conduct them as a trainee—some, they would conduct alone; other, they would conduct in the company of someone else.

The Chairman. Well, my time has expired. The final line is—and if you want to submit it for the record, or whatever you want to do, because I want to get on to other areas—what was testified to on the 2nd and what the internal document indicates is, I think, significantly different, and I think that is very serious in terms of understanding what OSHA is doing, because one of the key questions is whether you have enough inspectors to do the kind of job that Congress has mandated.

You have responded you have; you have testified you have those numbers; your own documents show that you do not. And we also find that there are too many areas which are not being adequately inspected, and there are too many injuries and fatalities that could be, I believe, significantly reduced if we had a vigorous inspection process and investigation.

[Information supplied for the record follows:]

EXPLANATION OF APPARENT CSHO COUNT DISCREPANCY

1,153

Two different indications of the number of agency compliance officers have allegedly been provided by OSHA. At the hearing on March 23, 1988, before the House Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies, OSHA stated that it had 1,153 compliance officers on board as of the end of February 1988. This number, consistent with numbers provided in the past, reflects an end-of-month head count of on-board compliance officer staff. Included in the 1,153 count are all safety or health inspectors in OSHA's area offices, the supervisory compliance officers in the area offices directing their activity, and all 11(c) discrimination investigators inspecting in the regions.

655

The alleged inconsistent number of approximately 655 was apparently taken from OSHA's internal evaluation report: Planned vs. Actual Resource Allocation Report (PVA-IN). The number in that report reflects quarterly data. The report was developed about 15 years ago to track program utilization of total staff hours compared to prior program plans. The 655 number is not a real number; it is a constructed number. It is derived by dividing the total hours directed towards compliance activity in a quarter by a general standard of effective work hours that would be generated per individual. It includes time expended by area directors and regional office staff (who, incidentally, are not included in OSHA's count of compliance officers). It stands as a rough approximation of effective worktime FTE devoted to various compliance activities.

Discrepancy

The apparent inconsistency exists because the number, 655, is not a head count of OSHA's inspector force, as is the 1,153. The 655 number is not directly related to persons actually performing inspections. It is not a count of compliance officers who filed inspection reports in the quarter in question. The number does not capture trainees, supervisors, or 11(c) investigators, all of whom are available and are properly considered in the agency's compliance officer head count. We regret any misunderstanding of the PVA-IN reports, but wish to point our that these reports are designed for internal purposes and are not intended for use by the general public.

The Senator from Utah.

Senator Hatch. Thank you, Mr. Chairman.

Now, for this matter, could we have that chart taken down and the other one beneath it exposed, please?

You are talking about two compliance officers out of 1,100 that testified here.

Mr. Pendergrass. That is right.

Senator Hatch. And you are going to check into it and see if what they said is correct and straighten it out if it is not.

Mr. Pendergrass. Absolutely.

Senator Hatch. But again, it is only two out of 1,100.

Mr. Pendergrass. That is right.

Senator Hatch. Okay. The prime point that I think has to be made about this time spent on inspections, and the thing that I think is unfair about the chart, is that the chart omits the construction industry inspections, which now constitute 58 percent of all inspections; is that correct?

Mr. Pendergrass. That is correct.

Senator Hatch. So that is why the chart is unfair.

Mr. Pendergrass. It is not complete, no.

Senator Hatch. It is not complete. Okay. I just wanted to get that out, because I think that is important.

Now, I have a lot of questions that I want to ask you, and I hope that you can help us. We are trying to get to the bottom and see what we can do to help this agency be even better.

It appears to me over the last two or three years under your leadership, Mr. Pendergrass, there have been a lot of changes; there have been a lot of good things happening.

It was implied at yesterday's hearing that the death of the spouses of three of the victim witnesses would not have occurred if the Reagan appointees to OSHA had acted on the confined space and lockout/tagout rulemakings.

Mr. Pendergrass, when did the rulemaking process on these standards begin?

Mr. Pendergrass. That began in July of 1975.

Senator Hatch. That is before Reagan, I think.

Mr. Pendergrass. yes, sir.

Senator Hatch. And the rulemaking process on lockout/tagout began when?

Mr. Pendergrass. That was 1977.

Senator Hatch. So again, before Reagan.

Mr. Pendergrass. Yes.

Senator Hatch. Okay. Now, Mr. Pendergrass, would it be accurate to say that the regulations on confined spaces have been under consideration at OSHA for 13 years, and on lockout/tagout, for 11 years, a period which encompasses the entire Carter Administration, is that correct?

Mr. Pendergrass. That is correct.

Senator Hatch. When the Reagan Administration came into office in January of 1981, were any health or safety regulations in a form ready for issuance as final standards?

Mr. Pendergrass. There were several proposals outstanding, but most of them were not ready for issuance as final standards.

Senator HATCH. So they were a long way from implementing them then.

Mr. PENDERGRASS. That's correct.

Senator HATCH. Looking back to 1981, there was some debate over several Carter Administration standards known as the "midnight standards" which many experts felt were inadequate.

Is that so?

Mr. PENDERGRASS. That is correct.

Senator HATCH. Was one of these standards the proposed Hazard Communication Standard?

Mr. PENDERGRASS. It certainly was.

Senator HATCH. All right. In an interview with my staff before these hearings, one of the witnesses from OSHA, Jennifer Silk, stated that the Hazard Communication Standard for manufacturing issued by OSHA in 1983 provided more protection for workers than the Carter Administration's "midnight standard" on the same subject. Is that correct?

Mr. PENDERGRASS. I would agree with that statement.

Senator HATCH. You agree with that assessment. Explain the reasoning behind your opinion that the Hazard Communication Standard for manufacturing, which was issued by the Reagan Administration's Director of OSHA in 1983, provided far more protection for workers than the "midnight standard" under the Carter Administration.

Mr. PENDERGRASS. That is correct.

Senator HATCH. Tell me why.

Mr. PENDERGRASS. I might add, Senator, the Hazard Communication Standard, with its provisions that are in place now, provide protection for the workers. They must know what it is they are working with; they must have training. And this is a continuing effort that never stops, and we think that is extremely important for protecting the workers in this country.

There was no requirement in the 1980 labeling proposal that employers provide training to their employees.

Senator HATCH. All right. Yesterday a chart was produced which purported to show that OMB significantly weakened the formaldehyde standard.

Do you think that that characterization is accurate?

Mr. PENDERGRASS. No, sir, I do not.

Senator HATCH. I might also add that Senator Kennedy suggested that Vice President Bush is against regulating toxic substances as carcinogens. Did Vice President Bush interfere with your efforts to regulate formaldehyde as a carcinogen?

Mr. PENDERGRASS. Not at all.

Senator HATCH. Not at all. And he certainly, it seems to me, is not against regulatory toxic substances as carcinogens. Have you ever heard any indication or seen any indication that he was?

Mr. PENDERGRASS. No, I have not.

Senator HATCH. Well, then, why don't you think that that characterization that OMB seriously weakened the formaldehyde standard is accurate?

Mr. PENDERGRASS. Well, it is not an accurate statement at all. When the formaldehyde standard was being considered, I advised the Health Standards group that I wanted a standard which would provide protection for employees, that there would be no residual risks. That is what we have. And it is a standard that I think not only I can be proud of, but I think that the Health Standards people can be proud of and the agency can be proud of.

Senator HATCH. Mr. Pendergrass, weren't you responsible, over OMB's objection, for retaining language in the standard which declared formaldehyde to be a carcinogen rather than an irritant?

Mr. PENDERGRASS. That is correct, yes.

Senator HATCH. You were personally responsible for that; is that right?

Mr. PENDERGRASS. Yes, sir.

Senator HATCH. Okay. Mr. Pendergrass, what was the position taken by the Department of Labor in the negotiations with OMB over the inclusion of the short-term exposure limit in the ethylene oxide standard, and what was the ultimate outcome of those particular negotiations?

Mr. PENDERGRASS. Mr. Chairman, the role that OMB has is to look at the standards, and if there are improvements that can be made, to make them. With the ethylene oxide short-term exposure limit, the proposal which we made is the one which was published.

Senator HATCH. What was the position taken by the Department of Labor in negotiations with OMB concerning the lockout/tagout standard?

Mr. PENDERGRASS. I have that standard on my desk today, and it is one which, again, provides the protection that we feel is necessary in the workplace.

Senator HATCH. Now let me just get down to the heart of the matter. Do you think, Mr. Pendergrass that it is fair or accurate for people to describe yourself, Mr. Baroody and others as officials who, quote, "ordered OSHA's retreat from safety"?

Mr. PENDERGRASS. Mr. Chairman, I have spent 40 years of my life—almost 40; in August, it will be——

Senator HATCH. You had better be careful; you had better be very accurate in this Committee.

Mr. PENDERGRASS. In August of 1948, I began a career in health and safety, and this is what my life has been dedicated to. I would never for a moment have considered taking the position of Assistant Secretary for OSHA if there had been any hint that there would be a retreat from safety. There has not been. And I am proud to say, I think we are doing an outstanding job.

Can we improve? Sure. We can always improve. But I am proud of the record of the agency, I am proud of the record of the Department of Labor and this Administration.

Senator HATCH. Now, OSHA has been criticized for not having an agenda for developing health and safety standards. What impact have the raft of lawsuits filed against OSHA had on your ability to set priorities for the agency?

Mr. PENDERGRASS. This has been probably one of the most troublesome things that the agency has been faced with. And we get mixed emotions, because the ability to file lawsuits, to petition, are things that the citizens of this country should have, and I would not for a moment suggest that the constituents should not be able to question our activities.

But it is frustrating when we have so many challenges. If we have to meet court-ordered deadlines, we do it. Sometimes we do this with a less-perfected standard than we would like. Until we could get those cleared up, we were hampered from setting an agenda. But we have set one, and the PEL Project is one that we are very proud of; it is the most massive rulemaking that the agency has ever undertaken, and we will complete that.

Senator HATCH. I am glad to hear that. Let's go back to those two OSHA compliance officers who testified yesterday from Irving, Texas.

They said that they were pressured into conducting phony investigations to inflate their numbers. Now, if we assume that that is true, is that a widespread practice at OSHA?

Mr. PENDERGRASS. No, sir, it isn't. It is contrary to policy, as Mr. White testified a few minutes ago; it is a serious breach of conduct. And we intend to investigate this to determine what actually has happened.

Senator HATCH. You will follow up on it. Well, I think you should.

The witness from your Philadelphia office testified about quotas of 42 to 45 inspections per year for each inspector. Is there such a quota, and if so, are you sacrificing quality for quantity in the inspection program?

Mr. PENDERGRASS. In the management of the agency, you have to set goals. These are overall goals for the agency, overall goals for each region and area office.

However, we have stressed in writing that there should be no sacrifice for quality in order to achieve a set of numbers.

If I may just for a moment relate a conversation that I had just yesterday. A director of an area office said that in the past—when he was director; he is no longer there—that he frequently did not make the number of inspections that were called for. The circumstances are different from one office to another, and we recognize this.

This did not hamper his career one bit; in fact, he has received two promotions since he was an area director. So it is a matter of judgment.

Senator HATCH. Those are goals, not quotas, then.

Mr. PENDERGRASS. They are goals, a management tool.

Senator HATCH. What quality controls do you use to ensure that your inspections are effective?

Mr. PENDERGRASS. There are many things that we have to look at to assure quality. One, we have an agency that is scattered across 100 offices in this country. We are a decentralized management. We expect our regional administrators and our area directors to assure that the people who are going out are doing quality jobs. Each inspection is reviewed by a supervisor.

We look at statistics. We look at how many inspections are made, what type, how long it takes, what violations are cited, the penalties that are proposed. This is a continuing process that we use to manage the agency and to assure as well as we can that quality is there.

Senator HATCH. All right. Testimony was presented yesterday from a member of your field staff which indicated that OSHA responds to complaints by investigating only the area of the specific hazard addressed in the complaint and that complaint inspections are not expanded to include other potentially hazardous areas.

Do you think that is a fair characterization or accurate testimony?

Mr. PENDERGRASS. Not quite complete, Senator. We expect our compliance officers to be professionals. We have given them the authority and the responsibility to expand any inspection that they may be on, depending upon the conditions that they find.

If they go out on a complaint inspection, it is the compliance officer's authority to expand that if they feel it is necessary.

Senator HATCH. Okay. Now, how do you answer complaints that the fines levied during your tenure are "phony"? For example, Chrysler was levied a fine of $930,000 for recordkeeping violations, but only had to pay $285,000.

How do you explain those types of discrepancies or disparities?

Mr. PENDERGRASS. Well, I doubt that Chrysler would call them phony, since they had to pay the bill.

With regard to the recordkeeping, in that particular case, we got corporate-wide abatement. We expanded the influence of that inspection far beyond the one plant that we were in. In order to achieve this, to get corporate-wide abatement, we were perfectly willing to give up some money, because what we are looking for is abatement.

Senator HATCH. You want the ultimate goal to be reached. You are not necessarily interested in procedure; you are interested in results.

Mr. PENDERGRASS. We are interested in results.

I might add, though, that in another case, which could not be expanded beyond the single plant, Chrysler was fined $1.5 million, which they have paid.

Senator HATCH. On March 9, 1988—just to get back to where we began—the Congressional Research Service issued a report entitled, "OSHA Safety Inspection Targeting: Causes and Effects". I would ask unanimous consent that that report be printed in the record at this point.

The CHAIRMAN. It will be printed.

[The document referred to appears on page 729.]

Senator **Hatch**. The report concluded that OSHA's success in reducing the injury and fatality rates in the construction industry, which accounted for 58 percent of all OSHA inspections in 1987, quote, "suggests that OSHA is getting some positive effects from concentrating its limited resources".

Now, I am a little surprised that this report has not been discussed earlier in these hearings. Would you comment on the CRS conclusion about the positive effects of targeting?

Mr. **Pendergrass**. Well, this is the objective, this is the goal that we have. And it is gratifying to hear that some people agree that——

Senator **Hatch**. The Congressional Research Service agrees.

Mr. **Pendergrass** [continuing]. That the effort is paying off. I do not think there is any question that presence has an effect—presence beyond the particular site that we are visiting.

Senator **Hatch**. On the other hand, the report found that agriculture was even more hazardous than construction and that OSHA, quote, "spends virtually no money on safety protection for agriculture", unquote.

The report concludes that, quote, "it would appear that OSHA's efforts properly targeted could conceivably have a substantial effect on reducing injury and fatality rates, with or without issuing additional standards", unquote.

Could you comment on those findings and then also, I would like you to comment on why OSHA coverage expanded during the period from 1980 to 1987—and I presume that will include the 15 million new jobs that have been created under this Administration.

Mr. **Pendergrass**. That is right. And if we look at the increase in the number of jobs——

Senator **Hatch**. It is unprecedented, isn't it?

Mr. **Pendergrass** [continuing]. It is unprecedented. Along with that, these are new people entering the work force, and there is a tendency for them to have more accidents than the experienced worker.

Senator **Hatch**. Well, I will make this last comment, since my time is up. You have got 15 million new jobs; you have had an economic recovery that has been one of the longest sustained recoveries since World War II; you have got an expanded responsibility. And if there is some defect in your ability to respond, perhaps Congress should step up and take its share of the blame, because we haven't exactly supported you up here, although some of us have tried; but we have not given you a whole lot of additional support for that additional burden which has occurred during that period of time.

I have a lot of other questions, which I will wait for my next round to ask, unless we do not have another round.

The **Chairman**. We will have another round.

Senator **Hatch**. Okay. Then, I just think that has to be taken into consideration, too, and I think from what you have been telling us, you are doing a pretty darned fine job. There are mistakes and there are things that have to be corrected, and I know you will work hard to do that.

Mr. **Pendergrass**. Thank you, Senator.

The **Chairman**. The Senator from Ohio.

Senator METZENBAUM. I sort of think that I am in a nether-nether-world. I just heard the Senator from Utah talk about what a wonderful job you have done. I heard you say, "We have done an outstanding job" I would say to you, Mr. Pendergrass, that I have some strong feelings about people who work in Government. And I heard four or five dedicated public officials yesterday indicate their own frustrations, and discuss their own inability to implement the work they were trying to do because either you or someone else at the Labor Department or someone at the Domestic Policy Conference, the White House, or a staff member of the Vice President's staff, told them no. And they made their disappointment and frustration quite clear.

I look at you, and I say, that looks like a pretty nice gentleman. And I just heard you say you devoted 40 years to industrial safety and hygiene. And I wonder: How can you possibly not have some sense of embarrassment or guilt when you yourself say that the Department has been remiss in doing the regulations that should have been done? Your memo of, I think it was March 23, 1988, talks about the fact that you have not done what needs to be done the failure to issue safety regulations and health standards, the failure to enforce those in effect.

And so I ask you: Why did you take the job? Why did you come here from the 3M Company and take on a public responsibility and then fail to meet that responsibility? What caused you to be here? Why do you want to be here? You had a good job at 3M? Why are you here?

Mr. PENDERGRASS. Senator, I would disagree with you that we as an agency or I personally have been a failure.

Contrary to what has been implied in your statement, I think the accomplishments of the agency over the past two years have been significant. We have issued a number of standards; we are actively pursuing a number of others; we have taken positions that will enable the agency to function far more effectively in the future than it has in the past.

With regard to the staff of OSHA, one of the gratifying things that I discovered in being a part of this agency is that we have among us a large number—in fact, almost all—are dedicated public servants. They are dedicated to safety and health. Do they always agree with each other? No. Do they always agree with what someone else perceives should be done or how it should be done? No.

But I think that the over 2,000 people that we have in this agency, including myself, are all striving to achieve the best we can in the way of protection for the workers of this country.

Senator METZENBAUM. Let me ask you, are you still connected with 3M?

Mr. PENDERGRASS. No, sir. I have retired. I have retirement pay from 3M.

Senator METZENBAUM. You have retirement pay?

Mr. PENDERGRASS. Yes. I spent 22 years there. I have retired, and I receive a monthly stipend.

Senator METZENBAUM. And you have no re-employment rights?

Mr. PENDERGRASS. No, sir.

Senator METZENBAUM. Well, do you think that this is an indication of a successful job performance: "In reviewing the performance of agencies within the Department, OSHA has been consistently late in meeting deadlines, both in its submissions to the PRB and its subsequent dealings with OMB. Moreover, OSHA was singled out by the Office of Management and Budget for strong criticism for its failure to act expeditiously on methods of compliance, the carcinogen policy, excavations, and face, head, eye and foot protection regulations. While other regulations were not mentioned by name, OSHA, because it has far the greatest number of regulations to deal with, is inevitably a major part of the slippage problem in OMB's charts."

Attached to that is a chart indicating that the Department of Labor has the worst regulatory performance as far as meeting schedules of any agency of Government. And you say you think you are doing a great job. But what I just read you were your own words; they did not come from somebody else——

Mr. BAROODY. No, Senator; they were my words.

Senator METZENBAUM [continuing]. Excuse me. They were Mr. Baroody's words.

Mr. BAROODY. Yes, sir.

Senator METZENBAUM. Do you think that the document I just read indicates you are doing a great job?

Mr. PENDERGRASS. I think you have to look at the history there and also what has occurred in the last two years and what is occurring today. We have made a great deal of progress. I will not claim that we have been perfect. Yes, there has been a problem with things being late, and this is one that I, the deputies, and our career managers are working on to correct, to improve.

Senator METZENBAUM. Do you have a daughter, Mr. Pendergrass?

Mr. PENDERGRASS. I have two daughters.

Senator METZENBAUM. You have two daughters. Put one of those daughters in the position of the woman who spoke here yesterday, a woman whose husband was killed when a coworker turned on an elevator while the victim was doing maintenance on the elevator shaft. The victim was instantly crushed to death. His death could have been avoided if there had been a lockout/tagout standard in place.

Last week, on the eve of these hearings—just last week—OSHA announced that OMB has approved the issuance of a lockout/tagout standard. OSHA and OMB together have delayed over ten years before reaching even this point.

My question to you is: Why has it taken so long to issue a simple rule that says, "If flipping this switch or turning this lever or pushing this button could accidentally cause the death or dismembering of a coworker, then that switch or lever or button must be secured with a safety device to prevent the accidental operation of that machinery"?

If the company where Mrs. Paumier's husband worked was able to install a safety lock within 12 hours of his death, how difficult a standard can this be to promulgate? Mrs. Paumier testified that she holds OSHA responsible in part for her husband's death.

How does that make you feel as the father of a daughter who might have had her husband in that elevator shaft?

Mr. Pendergrass. Senator, any injury, illness or fatality in the workplace is something that affects all of us. We are working to reduce that number. Eventually, we would like to see the time when there are none. And my reaction to that woman's grief, if it were one of my own daughters, would be the same. We want to prevent those things from happening.

Now, should it take a standard to have an employer install that device? I don't think it should. If it is, we will issue that standard. And that standard is sitting on my desk right now for me to review, the proposal.

Senator Metzenbaum. When will the final standard be in place?

Mr. Pendergrass. It is a little difficult for me to say, but the proposal will be published within the month, anyway.

Senator Metzenbaum. I am not interested in the proposal. I am interested in when will that standard be in place. You can answer that, Mr. Pendergrass.

Mr. Pendergrass. It will be done within the year. Remember that——

Senator Metzenbaum. Within the year, you may not be here, Mr. Pendergrass. That is the reality of the world in which we live. Why can't it be done before that?

Mr. Pendergrass. Because the Act has procedures which we must follow to allow people to comment on standards.

Senator Metzenbaum. What is the minimum time under those procedures?

Mr. Pendergrass. I am advised that it is nine months.

Senator Metzenbaum. That is the minimum time, nine months?

Mr. Pendergrass. Nine months.

Senator Metzenbaum. What would be the date—if you did everything on time—when could it be out?

Mr. Pendergrass. The procedure from beginning to end is more like 18 months to two years. And this is allowing the people to comment, evaluate those comments, write a proposal, have the proposal published, reviewed and eventually put into place.

Senator Metzenbaum. So there may be more people who lose their lives.

You have the lockout/tagout standard on your desk because Congress was breathing down your neck. Nine months from now is January 1st. Will it be published before January 1st?

Mr. Pendergrass. We expect it to be, yes, sir.

Senator Metzenbaum. Will you commit to this Committee that if OMB does anything to derail or delay the process, or there is any intervention on the part of anyone else in the administrative process, such as the White House, the Domestic Policy Conference, the Vice President or the President of the United States, that you will promptly advise this Committee of that fact?

Mr. Pendergrass. I am not sure what your statement means, Senator——

Senator Metzenbaum. What my statement means is that if anybody attempts to derail the process, you will immediately tell the Labor Committee of the United States Senate.

Mr. Pendergrass. We will keep you advised as to the process of the standard.

Senator METZENBAUM. That isn't really a sufficient answer, Mr. Pendergrass. Will you promptly advise us if there is any intervention or advisory or attempt on the part of the OMB, the Domestic Policy Conference, the Vice President or his staff, the President or his staff, or any other group that is not a party to the making of the regulation, to intercede?

Mr. PENDERGRASS. Senator, my understanding of the role of OMB, by law, by Executive action, is to review. I am not sure I understand what you mean by "derail".

Senator METZENBAUM. What I mean by "derail" is when the Office of Management and Budget sends back the kind of information we saw yesterday, saying take this out, change this, do that—that is derailing it. That is just causing further and further delay, and we know that time works against the process.

Mr. PENDERGRASS. As I stated, we will keep you informed of the status of that standard.

Mr. WHITE. I believe in addition, Senator, that the discussions that we have with OMB and any documents that go back and forth between OSHA and OMB are basically on the public record, so that you certainly will have access to any discussions that occur between us during that time.

Senator METZENBAUM. We want to be informed. We don't want to have to go looking in the public record. Will you do that? Will you inform us promptly?

Mr. BAROODY. Senator, John's confusion, I share, frankly, because under the Executive Order, we are required to submit all rules to OMB for clearance in accordance with the principles laid out in the Executive Order.

Surely, I don't think the Senator means to define that clearance process as interference. So we would need a good deal more guidance from you to know how to respond to your question.

The CHAIRMAN. Well, I think we understand there is sort of a three-phrase aspect of the clearance, where OMB makes comment. Will you supply the Committee what is recommended by the scientific and technical in each of those rounds, and what is the response of OMB in each one of those rounds, and submit that to this Committee?

Mr. BAROODY. Those are, I believe——

The CHAIRMAN. We are asking for that.

Mr. BAROODY. At the end of the process, I believe they are yours by right.

The CHAIRMAN. Well, we are asking for it on each phase of it; what the scientists say, what does OMB say. That is what we are asking you to provide.

Mr. PENDERGRASS. Mr. Chairman, this is a continuing process. It is 4.

The CHAIRMAN. Well, I will give you a personal assurance we are going to oversee it.

Mr. PENDERGRASS. Fine.

The CHAIRMAN. And we are going to get it, even if we have to subpoena you and any of the others, because we are not going to see this thing shunted aside again. I will just give you that assurance, and I have taken too much time.

Mr. **White**. Let me just say in addition, I think it is important to add that while we are working on the standard—and we are working as fast as we can—we are enforcing under the General Duty Clause. We are enforcing lockout/tagout in those situations where the General Duty Clause applies.

Now, I understand that that is not as effective as having a standard, but OSHA is not sitting by idle while we go through this rulemaking process.

Senator **Metzenbaum**. Mr. Pendergrass, in 1985, I sponsored an amendment to the reauthorization of the Superfund law that directed OSHA to put forth a standard covering the health and safety of firefighters and other workers involved in emergency and long-term hazardous waste operations. The amendment gave OSHA one year from enactment of the Superfund amendments to have the standard in place.

The amendments were enacted in 1986. It is now 1988. We still don't have the final regulation.

You have issued a Proposed Rulemaking and you have got some interim standard in place. But you don't have any final rules protecting the estimated 1.5 million emergency response personnel, or the tens of thousands of workers whose everyday job it is to clean up the thousands of hazardous waste dumps across the United States.

Why the delay, and how much longer must these tens of thousands of workers wait?

Mr. **Pendergrass**. Senator, the interim standard which is in place, which the Congress mandated, is in place, it is being enforced. The information that we have today is that the final standard will not deviate significantly from that. So all those workers are being protected today, and we are going through the process of rulemaking which has been laid down by the Acts—our Act as well as others—for promulgation of effective rules.

But I would like to insist that all of those workers are being fully protected today with the interim rule.

Senator **Metzenbaum**. The only people who don't agree with what you have just said are those who are seeking the protection. According to worker representatives, the interim standard is unclear about who is covered, what is required, and how it will be enforced.

When the worker representatives seek information, they advise me that OSHA is uncooperative. The interim standard is not viewed as rigorous by the workers it is supposed to protect. In any event, Congress mandated a final standard within one year of the 1986 enactment. What we don't understand is why can't OSHA do something—anything—the way Congress tells it to.

The International Association of Firefighters, representing 170,000 of the Nation's firefighters, have stated that they might sue OSHA in court over OSHA's failure to issue a final standard on hazardous waste operations.

In testimony before OSHA on the proposed rule, the Firefighters Union said, "No standard or guideline has been developed that defines what is expected of a response team in terms of minimum training and equipment requirements. The result has been a proliferation of uncoordinated and inadequately-funded approaches to hazardous materials that may ultimately result in firefighter casualties."

This statement was made after OSHA's interim hazardous waste standard had been in place for ten months.

The question is: Congress told you to do it within one year; why haven't you done it?

Mr. PENDERGRASS. Senator Metzenbaum, I am repeating myself here. We responded to the Congressional action to issue the interim standard, which we are enforcing. If there is confusion, if it is incomplete, this is what the process for permanent rulemaking is all about, and we are seeking that information—we have gotten a lot—and we will follow the procedures that are laid out.

If there are questions that have not been responded to by the OSHA staff, we would like to know it, and we will certainly get as much information to people as we can.

Senator METZENBAUM. Well, we have seen over a period of time failure of OSHA to respond, unless forced to do so by court order. We have seen that with the Field Sanitation Standard, we have seen it with the Hazard Communication Standard, we have seen it with the Ethylene Oxide Standard. And now, it seems like OSHA is following the same path with the standard on hazardous waste operation.

I can only say to you that when you say that you think you have been doing a good job, I say to you, Mr. Pendergrass, you have let down the workers of this country. You have not been doing a good job, by all of the objective evidence that is available.

My time has expired, Mr. Chairman. I will have additional questions.

Senator HATCH. Would you like to respond to that?

Mr. PENDERGRASS. We obviously disagree. I think we have accomplished a great deal. I think to characterize the agency as a failure is unfair; it is not accurate, and certainly does not in any way support the 2,000-plus people in the agency and their dedicated efforts to protect the health and safety of the workers in this country.

Senator METZENBAUM. I didn't say the people; I said the leadership.

Mr. WHITE. May I add one point here?

Senator METZENBAUM. Sure.

Mr. WHITE. I think it is very important to understand that the interim rule that is in place is a tough interim rule. Now, we have gotten comments that it should be strengthened through the permanent rulemaking, and we will have a permanent rule, and we estimate that by July we will have that permanent rule. But the statute itself, I am sure you are aware, requires the interim rule to be in effect during the period during which the final rule is undergoing rulemaking.

We will finish that rule. We will finish it promptly. We are going as fast as we can, Senator, I can assure you, to get that rule in place, and it will be a strong rule.

Frankly, our professional staff, about whom we have heard much yesterday, has assured us that the interim rule is strong and that the final rule will be strong. So I would be interested to receive from you the comments that suggest that there is not a strong rule in place. I think that is not the assessment of the OSHA professionals.

Senator **Metzenbaum**. Have you met with the firefighters?

Mr. **White**. I believe they have commented in the rulemaking, and we will take those comments into account in the final rule.

Senator **Metzenbaum**. But you haven't met with them.

Mr. **Baroody**. Might I also make some very short general comments?

Senator **Metzenbaum**. Sure.

Mr. **Baroody**. Senator Metzenbaum, you are talking—and we are all concerned about the length of time that rulemaking takes. It is the first thing that Secretary Brock instructed me to look into when I got to the Department, as I tried to state in my surprisingly, to me, controversial opening statement. The controversy, I apologize for. He was reinforced in that concern when GAO made similar findings and said something needed to be done.

The chart you referred to, which was attached to the memo I circulated does indeed make it appear that what is the largest regulatory agency in Government, the Department of Labor, is also the worst in terms of meeting its regulatory schedules. But I would invite a closer look at that chart, sir, because it also shows that we are the best.

The chart shows two things—actually, three, but relevantly, two—how many rulemakings on which we have met our deadlines and how many on which we have failed to meet our deadlines.

With respect to the first category, those that are on time, the Department of Labor has done better than any other department in Government. But the vexing problem is the complexity of the rulemaking process.

We have tried to find ways to work harder, as I also said in that opening statement, and have resolved that all the hard work in the world is not going to solve the problem unless we can figure out as well how to work smarter and how to build a different kind of regulatory approach, as John suggested in his opening statement and I tried to in mine.

We share your frustration about the length of time it takes to get rules out. We think on a relative scale, we have done better in the last three years than in any comparable period of time, and for that, we don't apologize; but we acknowledge it is only a relative scale.

The **Chairman**. The reason, as you well know, Mr. Pendergrass, why there has been a request for reviewing various rules and the role of OMB, is because as we saw very well yesterday, OSHA's enormously impressive and competent health scientists and safety specialists were deeply concerned that they were prevented from writing standards that best protect the health and safety of workers. And what we saw yesterday—and you will have a chance to review the facts—is that when OMB was asked to make a comment, time in and time out, almost universally, with one exception that was referred to, OMB has watered down the sound scientific and medical findings, at a time when OMB does not have a medical scientist.

So that is why we want to watch as this process moves forward, because we believe—at least I do—that the regulations ought to be based on sound scientific and medical findings.

So we believe the record in terms of the interference of OMB is there. But I will use my time going into just one of the number of cases that were raised yesterday and review it with you.

Mr. Pendergrass, we heard yesterday from Mr. Kellen about the painful and crippling effects of carpal tunnel syndrome, with which he was affected while working at the Morrell Meatpacking Company in Sioux Falls, South Dakota.

Do you agree that this affliction is one of the leading occupational injuries in the country?

Mr. PENDERGRASS. Carpal tunnel syndrome is certainly a very serious condition in this country, along with a number of other ergonomic type of injuries.

The CHAIRMAN. Well, it does disable workers; it results in them losing their jobs and makes it difficult for them to find productive work. And it is particularly prevalent in the meatpacking industry.

Did OSHA conduct a record check inspection of the John Morrell Meatpacking Plant in Sioux Falls, where Mr. Kellen worked in 1985?

Mr. PENDERGRASS. Do you want to respond to that?

Mr. WHITE. I believe there was an inspection attempted, and the records were reviewed.

The CHAIRMAN. And the inspectors reviewed OSHA's 200 logs and determined that the rate of injury was well below the national level; is that right?

Mr. WHITE. Yes, I believe that is correct.

The CHAIRMAN. So they made a finding that the rate of injury was below the national level. In accordance with the record check and the inspection policy then in effect, they did then leave without inspecting the plant under the existing procedures at that time—below the national average; therefore, no inspection of the plant.

Then the Food and Commercial Workers Local spent eight months documenting the fact that there was a serious under-reporting of injuries and illnesses on the log; is that correct?

Mr. WHITE. They filed a complaint with OSHA; that's correct.

The CHAIRMAN. The Local Union then filed a complaint with OSHA. And did the inspector return to the plant?

Mr. WHITE. I don't know whether he returned to the plant. I do know the complaint was withdrawn by the Union a short time thereafter, based upon an agreement that had been reached with the company.

The CHAIRMAN. We will come back to that. Did they go ahead and inspect—do you know if they returned to inspect the plant, and did they find serious under-reporting of injuries—and then, as I understand, they did a safety inspection.

Mr. WHITE. That's correct, Senator.

The CHAIRMAN. I know that you revoked the record check inspection policy last month, just a few days before these hearings were originally scheduled. But should it not have been obvious in this case and in other cases like it that the policy had invited under-reporting and should have been revoked?

Mr. White. I believe this case figured in our change in the policy, Senator.

The Chairman. The company was cited and assessed $690,000 in penalties for recordkeeping and $31,000 for safety violations.

Mr. White. Yes, they were.

The Chairman. And did the company contest the citation?

Mr. White. Yes, they did.

The Chairman. And were the citations for safety violations settled for half the penalty?

Mr. White. I believe that is roughly correct, yes.

The Chairman. And have there been settlement negotiations underway concerning the recordkeeping violations?

Mr. White. Yes, there have.

The Chairman. And the inspections in 1986 did not focus on carpal tunnel syndrome, did they?

Mr. White. As I mentioned, Senator, the complaint had been withdrawn, and so we did an intensive records inspection, which led to the $690,000 penalty.

The Chairman. All right. Then, did the United Food and Commercial Workers in Sioux Falls file a complaint with OSHA on January 18, 1988 and request an inspection because of the high incidence of carpal tunnel syndrome at the John Morrell plant?

Mr. White. Yes, they did.

The Chairman. Did the complaint state that the results of a survey showed that in the pork trim department, 69 percent of the workers had carpal tunnel syndrome symptoms and that the same was true of 71 percent of the workers in the hambone department, 78 percent in the hog kill department, and 80 percent in the sheep kill department and 83 percent in the beef kill department? That was their presentation——

Mr. White. If you have a copy of the complaint and that is what it says, I accept that.

[Information supplied for the record follows:]

Notice of Alleged Safety or Health Hazards

U.S. Department of Labor
Occupational Safety and Health Administration

1. Complaint Number

MOD Date

2. Employer Name
John Morrell & Company

3. Site Location (Street, City, State, ZIP)
1400 N. Weber Avenue Sioux Falls, South Dakota 57101

4. Mailing Address (if different) (Street, City, State, ZIP)

5. Management Official
Mr. Gary Junso

6. Telephone Number
605-338-8200

7. Type of Business
Meat Packing Plant

8. Hazard Description. Describe briefly the hazard(s) which you believe exist. Include the approximate number of employees exposed to or threatened by each hazard.

1. 2500 workers at John Morrell are exposed to hazards resulting from stressful repetitive motions of the hands and wrists. In a survey conducted by this local union of workers in some of the particularly high risk areas of the plant we are finding the following.

Pork Trim Department - Out of 72 persons working in the Pork Trim, 54 workers responded to the survey. 37 workers or 69% of those responding said they have symptoms of carpal tunnel syndrome.

Ham Bone Department - Out of 115 persons working in the Ham Bone, 52 workers responded to the survey. 37 workers or 71% of those responding said they have symptoms of carpal tunnel syndrome.

Hog Kill Dept. - Out of 107 persons working in the Hog Kill Dept. 62 workers responded to the survey. 47 workers or 76% of those responding said they have symptoms of carpal tunnel syndrome.

Beef Fabrication Dept. - Out of 297 persons working in the Beef Fabrication Dept. 203 workers responded to the survey. 162 workers or 80% of those responding said they have symptoms of carpal tunnel syndrome.

Sheep Kill Dept. Out of 47 persons working in the Sheep Kill Dept. 35 workers responded to the survey 28 workers or 80% of those responding said they have symptoms of carpal tunnel syndrome.

Beef Offal and Beef Cut & Ship Dept. Out of 71 persons working in the Beef Offal and Beef Cut and Ship Dept. 56 workers responded to the survey 41 workers or 73% of those responding said they have symptoms of carpal tunnel syndrome.

Beef Kill Dept. Out of 77 persons working in the Beef Kill Dept. 63 workers responded to the survey 52 workers or 83% of those responding said they have symptoms of carpal tunnel syndrome.

The total number of workers for each department was taken from the Seniority list dated 3/13/85. See attached questionnaires which were distributed to the workers. Continued on next page------------------

9. Hazard Location. Specify the particular building or worksite where the alleged violation exists.

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We also conducted an analysis of OSHA 2-0 Logs of injuries and illnesses from years 1983, 1984, 1985, 1986 and 11 months of 1987.
For 1983 out of a total 972 injuries/illnesses recorded 161 or 16.6% were recorded as repetitive trauma injuries. For 1984, out of a total of 1169 injuries/illnesses 190 or 16.3% were recorded as repetitive trauma injuries. In 1985 out of a total of 1146 injuries/ illnesses 246 or 21.5% were recorded as repetitive trauma injuries. In 1986 out of a total of 1397 injuries/illnesses 294 or 21% were recorded as repetitive trauma injuires. In an 11 month period ending on 12/5/87 out of a total of 2121 injuries/illnesses 546 or 25.7% were recorded as repetitive trauma injuries.

Many of these injuries are occurring among new workers. Contributing to the high rates are very fast line speeds, very little breaking in time for new workers, no medical program for detecting early signs of repetitive motion injuries.

The Company's method of treatment for these injuries is to prescribe anti-inflammatory drugs, vitamin B6, Hot whirlpools to workers complaining of pain in the wrist, which do little to address the problem. We find workers becoming crippled to the point where the only answer is surgery. In fact, from our survey we found 44 workers have had operations on their hands. Some workers get 2 or even 3 operations on the same hand.

Department workers figures are based on a departmental breakdown as of 3/13/85.

The survey was conducted at the end of June and concluded at mid-July, 1985.

We have included a copy of the questionaire which was used during our survey.

9 Hazard Location Specify the particular building or worksite where the alleged violation exists

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1. Pork By Products Department Floor 6 Stomach washer. Employees have been exposed to a hazardous job without proper safety and job training causing injury to the employee.

On January 14, 1988 an employee of the Pork By Department became entangled in an unguarded stomach washer. She was not informed as to how to do the job or where the start-stop switches were located. The start-stop switches were not labeled at the time of the accident.

9 Hazard Location. Specify the particular building or worksite where the alleged violation exists

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The CHAIRMAN. Yes. Carpal tunnel syndrome—I am not a medical expert, but the Committee does spend some time on the various health issues, and we saw an individual who had it. His hands looked 95 years old in terms of constriction, in terms of the use of his hands. It was, I thought, a very moving factor to see a young worker with hands that you could tell were virtually useless.

Now, the OSHA office began making plans for an inspection but had to wait for the arrival of a specialist on such injuries from NIOSH in Cincinnati, did they not?

Mr. WHITE. Yes, that is correct.

The CHAIRMAN. Are the inspectors in the field not trained for these types of injuries?

Mr. WHITE. Well, we do have trained inspectors, but we felt that in this particular case, given the potential magnitude, we wanted the best experts we could find to get in there.

The CHAIRMAN. So the OSHA inspectors went to the Morrell plant on March 29th, after the NIOSH specialist arrived, and when they arrived, were they denied entry to the plant?

Mr. WHITE. Yes, they were.

The CHAIRMAN. And the area OSHA office then sought authorization for a warrant to enter the plant, as provided by the Act, and the company or its attorney complained about the inspection. Was the area office request for authorization for a warrant denied, and was the area director told not to make the inspection?

Mr. WHITE. Upon review of—actually, the Labor Department's Office of the Solicitor, Regional Solicitor's Office, provided us with a warrant application. Upon our attempting entry, we were informed by the Regional Solicitor's Office that they did not believe that there was sufficient evidence to procure a warrant or, in the alternative, that if we did procure one, the likelihood was that it would be quashed if we were challenged in District Court.

The CHAIRMAN. Well, the complaint talked about 75-80 percent of the workers suffering from this type of injury, and it was a written complaint. And I understand that you were involved in the decision not to authorize the warrant; is that right?

Mr. WHITE. I am sorry—I was involved in what decision?

The CHAIRMAN. Were you involved in that decision not to authorize the warrant?

Mr. WHITE. I was certainly involved in the decision, and I fought very strongly to attempt entry.

The CHAIRMAN. Who does the Solicitor work for—you, or does he work for himself?

Mr. WHITE. He works for the Secretary of Labor.

The CHAIRMAN. Yes. Well, aren't lawyers supposed to do what their clients want—it is not supposed to work the other way around. I learned that much in law school.

Mr. WHITE. The Solicitor of Labor is responsive to the Secretary of Labor and is not necessarily, although they certainly try to, required to do what the agency wants them to do.

Senator HATCH. Nor is he supposed to do what the Secretary wants, either.

The CHAIRMAN. Could I just finish my turn, and then you can get your turn, Senator.

Mr. WHITE. Well, let me clarify, Senator. OSHA felt very strongly that we needed to get into this facility, that that complaint had merit. Our Solicitor believed there were legal problems in obtaining a warrant, and this issue was discussed up to the Solicitor, and frankly, that decision is being reviewed right now, and I believe that within the next week or several days that we will seek a warrant.

The CHAIRMAN. All right. Now, the company agreed to allow an inspection of three other matters mentioned in the complaint, but refused to allow the carpal tunnel syndrome inspection; is that correct?

Mr. WHITE. That's correct.

The CHAIRMAN. And did the OSHA area director fly to Washington two weeks ago, on April 7th, for a meeting with you, Mr. White, and representatives of the Solicitor's Office to protest the refusal of the national office to grant authority for a warrant?

Mr. WHITE. We asked that the area director and the regional administrator come in, basically to state their case, to provide additional evidence that we could provide to the Solicitor in order to try to seek a warrant; that is correct.

The CHAIRMAN. And the area director was told at the meeting that he could not get a warrant because it might interfere with the settlement negotiations between the Department and the company; is that a fair statement?

Mr. WHITE. No, I don't believe that is accurate. One of the concerns of the Solicitor's Office was that because we were preparing for trial, and in fact the trial of the recordkeeping case, the $690,000 case, was imminent, that the company would object to the carpal tunnel inspection because the individuals that were needed by the company to testify at the trial were the same individuals who were needed in the inspection. That was a concern of the Solicitor that that would result in the denial of the warrant.

We presented the Solicitor's Office with additional information, and they have reevaluated that information and, I believe, are very close to deciding to seek the warrant.

The CHAIRMAN. Was the Local Union aware or involved in the negotiation?

Mr. WHITE. What negotiation, Senator?

The CHAIRMAN. Those that you just described.

Mr. WHITE. No. These were internal discussions about how we should respond to the complaint.

The CHAIRMAN. The settlement negotiations.

Mr. WHITE. No, no—oh, the settlement discussions?

The CHAIRMAN. Yes.

Mr. WHITE. Yes, I believe they were. At the time that we were having these discussions, they had not elected party status. That is, they had not become a party to the case, and so were not a formal part of the discussions at that time.

The CHAIRMAN. Well, were they aware that these negotiations were taking place?

Mr. WHITE. I don't know that. I believe that I, in fact——

The CHAIRMAN. Well, evidently, they were not.

Mr. WHITE [continuing]. In fact spoke to the President of the Union and informed him that we were discussing the matter with the company.

The CHAIRMAN. Eventually, the inspectors did go into the plant to look at the three other matters in the Union's complaint, didn't they?

Mr. WHITE. They did.

The CHAIRMAN. And Mr. Kellen, who was our witness, saw them. He had a slip from the doctor saying he could not be scooping dry ice with his hand in the condition that it was. And there he was, still scooping dry ice, hoping the inspector would come his way, but he did not, because he was instructed not to do it. I think that is absolutely unconscionable, myself.

Mr. WHITE. Well, it would also have been improper for us to have proceeded at that point. We had been denied entry on that particular issue.

Make no mistake about it, Senator, we are going to get in this facility and do a full inspection, and we are going to do it as quickly as we possibly can.

The CHAIRMAN. Well, the OSHA statute requires you to respond in a written complaint of this nature, and I think you send a powerful message to the meatpacking industry and other industries with this kind of back and forth and backing away from the whole purpose and scope of the——

Mr. WHITE. I think, Senator, we have sent a number of powerful messages to the meatpacking industry, among which was the $2.8 million penalty against IBP. We have just completed an extensive carpal tunnel inspection of that facility, of Iowa Beef, and we will soon be issuing a citation in that matter.

The CHAIRMAN. Well, I will tell you a message that you also sent to the industry. As I understand, you made a speech at a conference of the meatpacking industry——

Mr. WHITE. That is incorrect, Senator. I did not make that speech.

The CHAIRMAN. Oh. Barry White; Barry White did.

Mr. WHITE. That is correct.

The CHAIRMAN. Excuse me. Barry White is the Director of Safety Standards.

Mr. WHITE. Yes, he is.

The CHAIRMAN. He made a speech at a conference of the meatpacking industry on October 7th and he had this to say about these high-profit, high-penalty cases that we have recently heard so much about—here is a transcript of his speech, talking about messages to the meatpacking industry.

Mr. White said, referring to the high-penalty cases: "It is a policy that we are trying to change because we think, too, that the penalties are too high. OSHA was never intended as a money-making organization. We would like to put ourselves in a position where we can be trusted, where we can be seen as an ally in safety and health, and not someone who is going to cost you $2 million. If the penalty levels are going to be $2 million, you are not going to want to invite us into your plants; you are not going to want to talk to us, and you are going to be too much worried about the money."

"And another thing—we are tired of showing up in the newspaper once a week with a $1 million penalty. We are learning slowly."

[The Barry White speech referred to follows:]

(The Barry White transcript)

[illegible]

A. ONE OF THE QUESTIONS WE HAVE BEEN ASKED REGULARLY IS ITS A DIFFICULT ONE FOR THE AGENCY TO ASK, YOU READ IN THE PAPER WHERE WE WILL FINE A COMPANY $2 MILLION FOR RECORDKEEPING, WE FINED SCOTT PAPER COMPANY $2.3 MILLION FOR RECORDKEEPING. IN THE SAME STORY 2 PEOPLE WILL BE KILLED IN A TRENCH IN DALLAS, TEXAS AND THE PENALTY WILL BE $3,000. PEOPLE HAVE ASKED US IN CONGRESS AND JUST THE GENERAL PUBLIC THERE IS SOMETHING WRONG WHEN AN AGENCY IS COMING UP WITH $2 MILLION PENALTIES FOR RECORDKEEPING AND YET YOU CAN KILL SOMEONE AND IT IS ONLY COSTING $5, $6, $7,000. AND THERE IS SOMETHING WRONG, WHAT IS WRONG IS WE HAVE A MECHANICAL SYSTEM OF FIGURING PENALTIES. ITS A FORMULA THAT WE HAVE DEVELOPED MANY YEARS AGO. IT WORKS FINE IF YOU HAVE ONLY ONE OR TWO INSTANCES OF VIOLATION AND YOU CAN FIGURE OUT WHAT THE PENALTY IS AND YOU CAN PUT A LOT OF THINGS IN AND YOU MULTIPLY AND YOU COME UP WITH 7 OR $8,000. NO ONE EVER REALIZED THAT WE WOULD FIND A THOUSAND INSTANCES OF A RECORDKEEPING VIOLATION INSTEAD OF GROUPING IT AND CALLING IT ONE SERIOUS VIOLATION THAT THEY WOULD WANT TO COUNT EACH ONE OF THEM. AND IF YOU FIND A THOUSAND INSTANCES AND YOU MULTIPLY THAT BY THIS FORMULA, YOU COM[illegible]UT WITH $2.3 MILLION. IT IS A POLICY THAT WE ARE TRYING TO CHANGE, BECAUSE WE THINK THAT THE PENALTIES ARE TOO HIGH. BUT YOU GET STUCK INTO THESE SYSTEMS OF PENALTIES AND IT IS VERY HARD TO CHANGE THEM.

THERE IS A LOT OF PRESSURE ON US TO INCREASE THE PENALTIES ON SERIOUS VIOLATIONS SO THEY MORE MATCH THE RECORDKEEPING VIOLATIONS. BUT OSHA WAS NEVER INTENDED AS A MONEY-MAKING

ORGANIZATION. WE DON'T GET THE FINES, THEY GO INTO THE GENERAL TREASURY. BUT WE WOULD LIKE TO PUT OURSELVES INTO A POSITION WHERE WE CAN BE TRUSTED, WHERE WE CAN BE SEEN AS AN ALLY IN SAFETY AND HEALTH, AND NOT SOMEONE WHO IS GOING TO COST YOU $2 MILLION. IF THE PENALTY LEVELS ARE GOING TO BE $2 MILLION YOU ARE NOT GOING TO WANT TO INVITE US INTO YOUR PLANTS, YOU ARE NOT GOING TO WANT TO TALK TO US. YOU ARE GOING TO BE TOO MUCH WORRIED ABOUT THE MONEY. SO I THINK YOU WILL SEE LESS OF THESE CITATIONS ON RECORDKEEPING. ONE OF THE REASONS BEING PEOPLE ARE STARTING TO KEEP BETTER RECORDS. AND ANOTHER ONE WE ARE TIRED OF SHOWING UP IN THE NEWSPAPER ONCE A WEEK WITH A $1 MILLION PENALTY. WE ARE LEARNING SLOWLY.

Mr. WHITE. Senator, I cannot begin to tell you——

The CHAIRMAN. What kind of message does that send?

Mr. WHITE. Senator, let me answer that question. Mr. White has been disciplined for those comments. Those were inappropriate, those were contrary to policy, and frankly, he was unauthorized to make them. And I was very angry, as we all were, over those comments which are not consistent at all with OSHA's policy.

The CHAIRMAN. Well, in every other agency of Government, we always have the clearance of these various talks or speeches. It is difficult for me to believe that this is at variance, looking at what the facts have been, how the agency has treated these various kinds of cases, how it handled itself in this particular case.

We discussed earlier the need for a confined space standard and a lockout standard——

Mr. PENDERGRASS. Mr. Chairman, may I respond to your comment that you just made?

The CHAIRMAN. Sure.

Mr. PENDERGRASS. As Mr. White said, the other Mr. White's comments were not authorized; they never have been. He has been disciplined for it. And in no way would we support his comments.

The CHAIRMAN. Well, he has been the Director of Safety Standards for how long?

Mr. WHITE. A few years. I am not sure.

The CHAIRMAN. Well, he has had this view in his mind, evidently; and this is the first time that the agency finally found out about it?

Mr. WHITE. It is an erroneous view.

The CHAIRMAN. Well, did he sort of make this up?

Mr. PENDERGRASS. Apparently, he did, yes. He did not get that from any of the leadership of OSHA or the Department of Labor.

The CHAIRMAN. Well, have you gone back now and looked at where he has come out for the last three years on various matters like this—because he has obviously had this attitude for the last three years, where he has been in charge of safety.

Mr. PENDERGRASS. He is Director of Safety Standards. He is not in charge of enforcement. He is not in charge of policymaking. His comments were totally beyond the pale.

Mr. BAROODY. And just to state the obvious, for however long he had those views, those fines were being issued.

The CHAIRMAN. We will get to that.

How was he disciplined?

Mr. WHITE. He was basically directed not to make any more speeches or to travel and make any public statements.

The CHAIRMAN. That is discipline? I mean, I give my children more than that. You just say don't do it again, just like saying no?

Mr. WHITE. Senator, I can assure you that Mr. White is properly chastised for this, and it will not happen again; and I think he has gotten some religion.

The CHAIRMAN. Well, I think you send a message, too, about how serious it is if you just say don't make anymore speeches, or you take some really tough steps. I would think that sends a message. But it just so happens this speech got out, so we have got to do something for you.

Mr. WHITE. Senator, the fact of the matter is that this individual does not act on the policy. He has nothing to do with the policy and therefore cannot impact the policy as it is applied by the Department of Labor. And we intend to continue to apply our policy of tough enforcement with respect to recalcitrant employers.

The CHAIRMAN. We discussed earlier the need for a confined space standard and a lockout standard and the lack of progress OSHA has made. And here is what this same Mr. White said about that at the same meeting: "Look at these standards when they come out. Read them, read through them. And if they appear amazingly stupid to you, or overburdening, or just not useful, then write in and tell us, and we will make changes in them."

How could he possibly come to that conclusion if he didn't have some——

[Excerpt from Mr. Barry White speech follows:]

EXCERPT FROM A SPEECH BY MR BARRY WHITE

ANOTHER ONE COMING OUT ON WALKING WORKING SURFACES. THIS IS SUBPART D IN THE 1910 STANDARDS. AIMED AT ADDRESSING HOW THEY SHOULD BE KEPT CLEAN, WHAT KIND OF SURFACES YOU SHOULD USE, HOW YOU CAN PREVENT WORKERS FROM FALLING WHEN THEY ARE TRYING TO DO A JOB.

AND FINALLY, A STANDARD ON PERSONAL PROTECTIVE EQUIPMENT. THIS IS EQUIPMENT WORKERS CAN WEAR THAT WILL MAKE IT MUCH SAFER FOR THEM TO WORK.

[redacted]

I THINK YOU HAVE THE SAME GOAL THAT WE DO A GOAL THAT WE HAVE HAD SINCE THE ACT STARTED. A MAN OR WOMEN GOES TO WORK IN THE MORNING THEY HAVE A RIGHT TO RETURN HOME AT THE END OF THE DAY IN THE SAME CONDITION THEY WERE WHEN THEY LEFT. AND IT DOESN'T HAPPEN THAT WAY A LOT.

AN AMAZING NUMBER OF PEOPLE ARE KILLED EVERYDAY AT WORK OR INJURED OR GET THE START ON A DISEASE THAT THEY ARE GOING TO CONTRACT, AND WE WOULD LIKE TO MEET WITH YOU AND HAVE AN OPPORTUNITY TO TALK IF WE COULD BE HELPFUL ABOUT SAFETY AND HEALTH PROBLEMS AWAY FROM THE WORK SITE IN OFFICES OR MAIL. WE ARE NOT HAPPY WHEN THE ONLY TIME WE DEAL WITH AN INDUSTRY IS WHEN WE ARE ARGUING OVER A VIOLATION WHEN WE ARE IN A WORKPLACE AND WE START TO FUSS WITH YOU ABOUT WHETHER THERE IS A VIOLATION OF THE STANDARD. IT IS PRETTY

Mr. **Pendergrass**. I don't know how he could come to that conclusion.

The **Chairman**. Well, what did he tell you—what did he tell you when you disciplined him? What did he tell you?

Mr. **White**. We addressed the issue of his remarks on the enforcement policy, Senator.

The **Chairman**. I am asking Mr. Pendergrass. What did he tell you when you made that kind of statement? What did he say to you?

Mr. **Pendergrass**. Mr. Chairman, Mr. White was the one who dealt directly with the Director of Safety Standards. I did not.

Also, I would like to say, Mr. Chairman, that this is a personnel issue. This is a long-time Federal employee. And I do not really think that this is the place for us to discuss Mr. White's actions and what we have done.

Mr. **White**. Let me add, Senator——

The **Chairman**. I couldn't disagree with you more. His statements and actions directly affect public policy, and that is what we are involved in, directly.

Mr. **Pendergrass**. And we have responded to that, Mr. Chairman, but you are getting into what the personnel actions are, and I don't think that that is the thing to do at a public discussion.

Mr. **White**. Let me say one thing. Mr. Barry White, the thing he does best is put out proposed rules and final rules in a timely way. He is among our best managers in terms of producing products on time, and that is his responsibility, and he does that well.

The **Chairman**. Just a final question, because my time is up. When are you going to let the inspectors into the Morrell plant?

Mr. **White**. As soon as we get a warrant.

The **Chairman**. When are you going to get that?

Mr. **White**. I do not know. We are going to have to apply for a warrant and obtain the warrant and then seek entry, and as I indicated, we hope that that will be within the next week.

The **Chairman**. Well, in the meantime, these workers are continuing to suffer.

My time has expired. Senator Hatch?

Senator **Hatch**. Thank you, Mr. Chairman.

I will just make a statement right here and now—I am prepared to give you some teeth, if the Chairman is prepared to work on it, to deal with Federal employees who are out-of-line. The fact of the matter is you know you are very limited in what you can do as far as disciplining; is that correct?

Mr. **Pendergrass**. That is correct.

Senator **Hatch**. In fact, you can hardly do anything other than verbally tell him that this is wrong, it is out-of-line, it shouldn't be done, and you are not going to give any more speeches because of it.

Mr. **Pendergrass**. We are very limited in what we can do.

Senator **Hatch**. And one reason you are is because this Committee won't do anything to give you any teeth to discipline employees. So it is one thing to complain about it and act like you should have fired the guy when, if you had fired him, you would have had one of the biggest employee rights suits in the country; right?

Mr. **Pendergrass**. That's correct.

Senator HATCH. I mean, it is nice to make these points before the cameras, but my gosh, let's realize who put these kinds of rules into effect. It is almost impossible to discipline a Federal employee unless it is so blatantly wrong, and even then you are going to wind up in litigation in most cases.

Mr. PENDERGRASS. That is absolutely true.

Senator HATCH. And I take issue with Senator Metzenbaum's statement that four OSHA specialists expressed frustration yesterday with you and other Labor Department officials. Actually, as I remember my discussions about that testimony, they complained about OMB, the Office of Management and Budget, and it seems to me it is impossible to get down to the bottom of their complaints unless we bring OMB in here.

Senator METZENBAUM. If my distinguished friend had been here, he would have found that their testimony absolutely confirmed the representation I made.

Senator HATCH. Well, we'll get the testimony out and we'll look at it, but I don't think you are right on that.

Senator METZENBAUM. All right. But if you had been here, you would have heard them indicate their frustration.

Senator HATCH. That is fine. I am aware of what goes on in the Committee, whether I am there or not.

The CHAIRMAN. The Senator has the floor. We don't want interruptions.

Senator HATCH. But let me just say this to you. Let's get the record on it.

Senator Metzenbaum implied that you should move more quickly to issue rules, and yet you are involved in all kinds of litigation that prevents you from issuing rules. Is that correct?

Mr. PENDERGRASS. That's correct.

Senator HATCH. I think it's only fair to point that out. If you didn't have to spend so much unnecessary time in court—and again, we have given this right to people to sue you. Now, I think you have expressed that people ought to have a right to sue, but there are a lot of suits that really should not be brought, too.

Mr. PENDERGRASS. That's right. But the right is there, and it is one that we should respect, we must respect.

Senator HATCH. But you still have to spend the time and the efforts defending yourself in court, in many cases on frivolous suits.

Mr. PENDERGRASS. That is correct. And the statement was made that someone is going to sue us over the hazardous waste regulation. I would hope that they do not, because all that will do is delay our being able to get the standard out.

Senator HATCH. I agree. Now, Senator Metzenbaum cited the Baroody memo as criticizing OSHA for failing to meet the OMB deadlines. Isn't one of the reasons that you miss the deadlines is that you have had many protracted fights with OMB in which you have revisited OMB efforts to weaken the standards; is that correct?

Mr. PENDERGRASS. That is correct. And one of the things that I have made quite clear to our standards people is that the standard that results from our action and interaction with the Policy Review Board and with OMB is that we have an effective standard as far as the workers of this country are concerned, and we have had those.

Senator HATCH. Well, Senator Metzenbaum seems to want it both ways. He wants you to resist OMB, but get out the standards, get them out promptly. Now, those may be conflicting considerations, wouldn't you agree?

Mr. PENDERGRASS. The relationship, negotiation, review by OMB is a time-consuming process, yes.

Senator HATCH. Now, with respect to Senator Kennedy's comment on the meatpacking plant inspections, I would like to ask if either the Senator or the staff or anybody advocates that OSHA violate the law by ignoring the requirement of obtaining a warrant before OSHA makes the inspection that is under discussion. That has to be the way it is done, isn't it?

Mr. PENDERGRASS. Yes, sir. And having been sued a number of times in the past two years, I am not going out of my way to be sued or held in contempt of court.

Senator HATCH. Well, and if we are going to raise such a fuss about Mr. White—not you, Mr. White, but Mr. Barry White, who has been disciplined—then he should be here to explain why he made such stupid statements.

Mr. PENDERGRASS. Yes.

Senator HATCH. And I don't think we should belabor you people, necessarily, when you are limited as to what you can do, by us wonderful people up here, who are so interested in protecting Federal employees--as we should be—that we make it very difficult to discipline.

Let me go to another thing. Mr. Baroody, let me turn to you. We have heard you described as what amounts to be OMB's "man at the Department"—that is, I guess, the implication by some of the questions that you have had to undergo. In the interest of accuracy, would you describe your role in formulation of OSHA policy at the Department and your role on the Policy Review Board?

Mr. BAROODY. Yes, sir. And I again tried to capsule that at the beginning. My role in that capacity, which is a general capacity and focuses on the major policy developments at the Department of Labor across-the-board—all regulatory activity, not just OSHA's, and other activity, not just regulatory. The Policy Review Board was set up in response to specific instructions to me by Secretary Brock that he wanted to establish in response to—reinforced by—the GAO report, that what was needed was an open and collegial decisionmaking process, one that could make decisions or render recommendations to the Secretary.

We have had that. We have met 90 times. We have considered everything from——

Senator HATCH. Ninety times?

Mr. BAROODY [continuing]. 90 times—everything from the implications of the changing work force for employment and training needs to rules that OSHA, MSHA and other regulatory agencies were contemplating to put out.

It has been an open process, and John said that we sometimes disagree—he wasn't at the moment speaking about him and myself—but within his own agency. Well, the PRB is a process set up explicitly to try to structure disagreement, not to hide it, not to sweep it under the rug, not to bulldoze over it, but to structure it and see if it is possible.

Senator HATCH. In fact, if you didn't do it that way, you would find yourself up here under worse circumstances than you have been the last few days.

Mr. BAROODY. You bet, you bet. But the fact of the matter is that there is a positive virtue in taking the approach we have taken. We have tried to structure that disagreement to see if consensus can be struck. More often than not, in fact, it is.

You asked if it was correct to perceive me as "OMB's man". OMB is not here. I would encourage you to put that question to them. I think at best you would get a mixed response. I can only tell you how I view myself at the Labor Department. For the first two and a half years I was there, I viewed myself as "Bill Brock's man", and if it is not indelicate to put it this way, I now view myself as "Ann McLaughlin's man" at the Labor Department.

Senator HATCH. The two successive Secretaries of Labor.

Mr. BAROODY. That is correct.

The CHAIRMAN. Does Mr. Brock know that? [Laughter.]

Mr. BAROODY. It is Mr. McLaughlin. [Laughter.]

The CHAIRMAN. Mr. McLaughlin.

Senator HATCH. Reviewing your experience with OSHA, an objective person, it seems to me, would have to conclude that there are some serious flaws in the regulatory process. And I think we all have to acknowledge that. This is not an easy agency to run with the limited tools, legislatively, that we have given you. And certainly, there are flaws, as I see it, in the regulatory process. The current system seems to be designed to generate litigation, mandate delay, and encourage inaction. To me, it looks like that.

We have heard testimony over the last few days about how terrible this Administration's management of OSHA has been. We also know how terrible the prior Administration's record at OSHA actually was. So let's not throw stones at anybody. The fact is you have got a lot of limitations on you, you have got a lot of difficulties, and some of them, we put there.

Assuming that the ultimate purpose of these hearings is substantive reform, we need to consider not just who is to blame, but also what ought to be done; what kind of tools can we give you to help you?

I am not one who believes that every Washington bureaucrat is out to wreck the people in the country, or to not operate in accordance with the best goals and aims of the agency. I have found in Democrat Administration under which I have served and Republican Administrations under Reagan, under which I have served, that most people who come to this town sacrifice a lot to be here and really try to do their jobs in the best way they can. And sometimes they are very limited in what they can do.

Mr. Baroody, I want to follow up on your comments about what OSHA might be like in the future, because you have talked about that there is a future for OSHA that could be better. I would like to follow up on that.

What steps can this Committee take to avoid the cumulative mistakes of the last two decades, lessen litigation, and better guarantee safety? Those, it seems to me, would be good goals if we can find some way of doing it, and if you can help us to move into the future, these hearings will have been a great success, in my opinion. But if all we are here to do is to beat up on people who sacrifice to come to Washington, whether they are Democrats or Republicans, then I think these hearings are a waste of time, especially with some of the stuff I have heard here today.

Now, tell me, what can we do to lessen litigation, to protect employee rights better than we have, and of course, to get rid of these cumulative mistakes that have been mentioned in the last three days, and that you realize exist? What can we do to make this the great agency that in some ways it is, in some ways it is not?

Mr. BAROODY. I thank you for this opportunity, Senator. This problem is, first of all, not only that these regulatory proceedings are horribly contentious and very litigious. I am telling you what you already know, and I think that I have heard your complaints today about that process. I think it is possible to envision a different way.

I want to remind the Committee that if in the next three years, we duplicated the product of 26 health rules of the last 19 in just those next three, we would still only have 52 health rules, and there are thousands, or literally tens of thousands, of health hazards in the workplace.

Senator HATCH. Why don't you just do that? That's the implication of this Committee.

Mr. BAROODY. Well, with your permission, we will go ahead and do it that way, but then, of course, we will run afoul of the APA, which requires that we give notice and comment opportunity to the regulated community. We will run afoul of the Paperwork Reduction Act. We will certainly be sued, probably rightly, probably by both sides, for being arbitrary and capricious——

Senator HATCH. No.

Mr. BAROODY. I am afraid so, Senator.

Senator HATCH. Is that right?

Mr. BAROODY. Yes.

Senator HATCH. It sounds to me like it is almost impossible to protect the workers of this country the way we have set this up.

Mr. BAROODY. It is not impossible to protect the workers of this country.

Senator HATCH. But it is tough, isn't it?

Mr. BAROODY. It is very tough, and it is very serious business, and we take it seriously.

Senator HATCH. Well, can't you just change those by internal rulemaking and regulation?

Mr. BAROODY. That is not within our power, Senator. We have to be guided, obviously—I think, tautologically—by the statutes that govern.

Senator HATCH. Do you mean we haven't give you the power to do these things right?

Mr. BAROODY. You have not given us the discretion to do them without consulting the regulated community and meeting other statutory requirements, that's true, Senator.

Senator HATCH. Well, of course, I see some merit in that. But like you point out, it does take time, and it is contentious, and it is litigious, and it really may be a very difficult situation for you.

So it is nice for us to sit up here and beat our breasts and pontificate about how awful you are, when all you are trying to do is go through that maze that is created, right up here on Capitol Hill, and I suspect whoever is the Administration, one side or the other, can find fault with OSHA under those circumstances.

Mr. BAROODY. May I draw out one example, Senator?

Senator HATCH. Yes.

Mr. BAROODY. The health scientists in OSHA are expert. They are, I believe, as expert now as they have been in the past. In the rulemaking process, I have learned over the last three years, there is the necessity to document very carefully and very deliberately on a host of questions, but most especially, I suppose, two—on the question of feasibility and on the question of significance of risk.

The first benzene proposal did not adequately address the question of significance of risk, and the Supreme Court of the United States said so, and having said so, remanded it back to the agency. That is not because the OSHA scientists are not expert. It is because those judicial criteria were not fully known at the time, and the law has developed since.

If they had had in OSHA then the benefit of what we know now about what it takes, then perhaps the first benzene standard would have stuck and survived any challenge, and OSHA over the last seven years would have implemented and enforced that benzene standard instead of spending almost all of that time drafting a new one. And it is no accident, Senator, that the new one is 1,000 pages long.

Another criticism we get of our regulations—I have freely said it myself, before and even after I came into the Department of Labor—is that they are difficult and complex, and they do not provide simple, easy instructions to employers who have good faith to comply, much less to those who are more resistant. A 1,000-page benzene standard, however, is no accident——

Senator HATCH. One thousand pages?

Mr. BAROODY. One thousand pages.

Senator HATCH. For one standard.

Mr. BAROODY. It is my understanding that the reason for that is to make sure that OSHA could produce a document which would not disserve workers by going out once again and then being sent back by the courts—in short, to make a document, a rulemaking, a final rule, that could endure. And I think, in fact, in this benzene standard, that's what we have.

Senator HATCH. Well, my time is up, but I just want to say that you fellows have a tough job, and I know that there are ways you can improve, and I know there are ways you can correct mistakes and errors, and I think it is only fair for us to understand that this is not an easy job. My experience with your office has been that you are dedicated to trying to help the workers and employees of this country, and you are trying to do it the best you can.

Now, that doesn't mean we can't do it better, and I guess these hearings are to encourage you to do it better, and I certainly join my voice in that.

I have a whole raft of additional questions, but I will just wait for my next chance to ask some more. Mr. Chairman.

Mr. PENDERGRASS. Thank you, Senator.

The CHAIRMAN. The Senator from Ohio.

Senator METZENBAUM. Mr. Pendergrass, I was quite impressed with that comment concerning Mr. White and the problems of doing something to discipline him. Why don't you just move him out of his job or fire him? What is so complicated about that?

Mr. PENDERGRASS. Well, I think that you are certainly as aware of the procedures, the rules, the regulations with regard to the protection of Civil Service employees.

Senator METZENBAUM. You can shift him from one job to another.

Mr. PENDERGRASS. But I think the thing that you may have missed is that Mr. Frank White, who is direct supervisor of Mr. Barry White, made the statement that Barry White is an effective employee, he does his job well. He did not, in this case——

Senator METZENBAUM. How can he be doing his job well when he is telling people that the fines are too high and that if you don't like the standards, you can come in, and we'll try to change them for you. How can you say he is doing his job well?

Mr. PENDERGRASS. That is not his job, Senator.

Senator METZENBAUM. I know, but that's what he said, and he is speaking——

Mr. PENDERGRASS. He said that. He has been reprimanded for it. But that is not the job that he is assigned to do. He does his assigned job well.

Senator METZENBAUM. Mr. White, why don't you just go in and ask for the warrant? You don't need that much evidence. You can make a prima facie case out of it. You've got the complaint. I don't understand why you are waiting to go in to get it.

Mr. WHITE. Well, Senator, I used to be in the Solicitor's Office, and if it were up to me, maybe I would. I am no longer in the Solicitor's Office, and other lawyers in that office make those decisions. I can't make that decision, Senator.

Senator METZENBAUM. You can't tell the Solicitor you want to go in, and you are going in, to obtain a warrant?

Mr. WHITE. We have told the Solicitor that we want to go in. We presented the Solicitor with all of the evidence, and we believe have persuaded the Solicitor that it is time to seek that warrant.

Senator METZENBAUM. Meanwhile, the man who testified here yesterday and the other workers are working in the plant, having to pick up dry ice, and suffering carpal tunnel syndrome.

Mr. WHITE. I fear that that is an accurate statement, Senator.

Senator METZENBAUM. Mr. Pendergrass, last year in two separate incidents, two Ohio utility linemen were electrocuted and severely injured while performing line maintenance and repair. OSHA cited the employer for safety violations, fined the employer less than $2,000—two serious accidents, with fines of less than $2,000—and dropped the cases when the employer contested the charges.

We investigated and discovered that for more than five years, OSHA has been sitting on a standard for the electric utility industry that might have prevented these two injuries and many, many more.

The standard was jointly submitted to OSHA by the Edison Electric Institute, an employer group, and the International Brotherhood of Electrical Workers. In a letter to OSHA dated April 27, 1987, the Edison Electric Institute stated: "By allowing the joint EEI/IBEW proposed safety standard for electric utilities to languish for five years without proposing it for rulemaking, OSHA has been squandering a unique opportunity to demonstrate to the Nation that joint labor/management cooperation can result in speedy, intelligent regulation which is both cost-effective for business and genuinely protective of workers."

How can OSHA justify stalling action on this standard when it represents a unique and intensive effort by labor and management to propose joint standards for the utility industry?

Mr. PENDERGRASS. Senator Metzenbaum, if I may, I would like Mr. White to respond, because that is an area that he is very much involved in.

Senator METZENBAUM. Briefly, because we have got seven and a half minutes to get to the Floor for a roll call.

Mr. WHITE. You are right, Senator. That is an impressive kind of effort that we like to see. When an industry group and labor group come in to us, arm-in-arm, with a proposal, we should look favorably on that. It was the judgment of our professional staff, however, that it was not sufficient. While it was a good start, there was more input that was needed from more interested parties, and the changes needed to be made.

Should it have taken five years? No, it should not have. And frankly, I must give some credit to Mr. Baroody for getting us to move that standard along. This is an area where, while it did need some work, it probably shouldn't have taken this much time, and we intend to push this standard through.

Unfortunately, I don't have a timetable in front of me.

[Information supplied for the record:]

DRAFT PROPOSED STANDARD

The draft proposed standard on electric power generation, transmission and distribution was approved by the Department of Labor's Policy Review Board on October 29, 1987. It is now undergoing final review at the Office of the Solicitor, after which it will be transmitted to OMB.

Senator METZENBAUM. Well, let me just point out to you, Mr. White, that the Edison Electric Institute's letter includes a chronology of meetings with OSHA officials over six years: OSHA promised to issue the proposed rule in late 1983; OSHA promised to issue a rule again in May or June of 1984; OSHA made the third such promise in the fall of 1986.

This is industry telling you that they want a standard, and OSHA keeps promising but not delivering, and now you tell me that Mr. Baroody deserves a lot of credit.

Mr. White, Mr. Baroody, and Mr. Pendergrass, I think you are a total disappointment as far as public officials are concerned. I hate to say that to you, but what I have heard here today and yesterday is depressing and demoralizing.

[Information supplied for the record follows:]

EDISON ELECTRIC INSTITUTE The association of electric companies

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April 27, 1987

Hon. Michael Baroody
Assistant Secretary for Policy
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Meeting re EEI/IBEW Joint Proposed OSHA Standard
For Electric Utilities

Dear Mr. Baroody:

Thank you for agreeing to meet with representatives of Edison Electric Institute (EEI) on April 29, 1987, at 9:30 A.M. We wish to inform you that because of the importance of the issue involved to both labor and management in the electric utility industry, EEI will be joined by Mr. Robert Macdonald, Director, Utility Department, International Brotherhood of Electrical Workers, AFL-CIO. Indeed, we invite you to consider the meeting as one jointly with EEI and IBEW.

Our purpose is to bring to your attention, and through you, to that of Secretary Brock, that by allowing the joint EEI/IBEW proposed safety standard for electric utilities to languish for five years without proposing it for rulemaking, OSHA has been squandering a unique opportunity to demonstrate to the nation that joint labor-management cooperation can result in speedy, intelligent regulation, which is both cost-effective for business and genuinely protective of workers.

We understand that within recent months, OSHA has finally completed a draft proposed standard, and transmitted it to the OSHA Solicitor's Office for review, where no attorney has been assigned to the project and no review yet undertaken. We ask that the Department now assign priority to this project, and commit itself to a meaningful timetable for issuing a proposed standard.

To acquaint you with this matter, we attached a brief background paper, pertinent past EEI and IBEW correspondence with OSHA, and a synopsis of the previous efforts which EEI and IBEW have made to secure the issuance of a proposed standard.

In addition to the undersigned, present at our meeting for EEI will be Mr. David Parker, Vice President, Government Relations and Stephen C. Yohay, Esq., of McGuiness & Williams. We look forward to talking with you.

Sincerely,

Carl D Behnke

Robert Macdonald
Director, Utility Department
International Brotherhood of
Electrical Workers, AFL-CIO

Carl D. Behnke
Vice President, Human
Resource Management
Division
Edison Electric Institute

Enclosures

History of Events Related to EEI's and IBEW's Pursuit of an OSHA Standard to Regulate Maintenance Operations in the Electric Utility Industry.

1971

OSHA promulgated a standard which addressed construction of electric utility facilities. (Subpart V) OSHA informed utilities that a standard for maintenance and operation would follow.

1974 - 1979

Voluntary Committee (EEI, IBEW, UWUA, rural coops, public power) formed with OSHA's concurrence to draft maintenance standard. Disagreement developed on two issues and OSHA Assistant Secretary Bingham would not publish the proposal without 100% agreement of voluntary committee. Committee was dissolved.

April 10, 1981

Melodye Turek met with Thorne Auchter, Assistant Secretary of OSHA, and explained the concept of the maintenance standard. Auchter told Turek to "polish-up" the old committee draft and submit it for OSHA's consideration.

April, 1981 - April, 1982

Considerable time and resources spent by EEI and member companies to edit, revise and improve the original voluntary committee draft.

April 8, 1982

Meeting with Auchter, Jim Leva, President of Penelec and Melodye Turek. Edited committee draft submitted to Auchter. Leva reviewed the concept of the standard. Auchter assigned the project to Becky Rose and gave it a "high priority." Turek was told that she would be contacted very soon to assist in developing economic impact statement. Two months elapsed with no word from OSHA. Becky Rose was contacted and a meeting was set up with Ms. Rose and Barry White, OSHA Director of Safety Standards. At this meeting EEI was informed that the project was stymied because of criticism from the OSHA technical staff in the electrical section.

June 25, 1982

After three months with no progress, Pierce Head, EEI OSHA Task Force Chairman, wrote to Auchter, described the current situation and asked for a meeting.

July, 1982

Meeting with Auchter, Pierce Head, and Turek. Auchter promised to find out why there was no action on the standard.

July, 1982

Letter received from Auchter stating that the project would be placed in his "Regulatory Management System" and that Auchter would make a final decision on promulgation "in the fall."

September, 1982 - October, 1982

EEI meetings with IBEW and UWUA. Consensus reached on entire standard except for two provisions.

December, 1982

Meeting with Auchter, Head, Turek, Behnke. Discussed talks with unions. Auchter told us he was at that time placing the standard in his "Regulatory Management System."

January, 1983

After meeting with Dick Chapin, Melodye Turek, Jim Dushaw, and Jim Ozello, EEI and IBEW reached full agreement on the draft standard.

January, 1983

Letter to Pierce Head from Thorne Auchter stating that "OSHA will attempt to issue a Proposed Rule in late 1983 or early 1984."

February, 1983

Steve Yohay meets with Frank Blake, Esq. Deputy Council to the Vice President to gain support for the standard.

March, 1983

Steve Yohay, Lee Paden and Melodye Turek meet with Senator Don Nickels, Chairman Senate Subcommittee on Labor. He agrees to support EEI's request for a vertical standard.

March, 1983

Steve Yohay meets with Benjamin Love, Executive Director, Intergovernmental Relations, Office of the Secretary, U.S. Department of Labor. Yohay gives history of the project and assures that no Regulatory Impact Analysis is required.

March 1983

Letter to Auchter from Senator Don Nickels urging him to give his special attention to the EEI project.

November, 1983

EEI and IBEW representatives meet with OSHA's Barry White, OSHA Director of Safety Standards, who agree that the standard will apply exclusively to electric utilities.

November, 1983

Barry White speaks to EEI Safety & Health Committee in Dallas. Promises proposed rule in May or June, 1984.

July 17, 1984

OSHA does not publish a proposed rule in June as promised. EEI meets with Daniel V. Benjamin, Chief of Staff, U.S. Department of Labor. During the meeting, Barry White states that a vertical standard applicable only to electric utilities will be forthcoming. White promises a proposed draft by the end of the month.

July 31, 1984

OSHA gives EEI and IBEW a draft that the OSHA staff has developed. It varies in almost every important aspect from the draft submitted by EEI and IBEW.

August, 1984

EEI representative, James R. Leva, President of Penelec, writes to Daniel Benjamin asking why a proposal which had complete agreement of both EEI and IBEW was set aside, and a new draft developed by the OSHA staff which is unacceptable to EEI and IBEW. Importantly, in OSHA's new draft the scope has been expanded to cover industrials.

August, 1984

IBEW Representative Bob Macdonald calls Joe Pipkin, Head of OSHA Electrical Section to express concern over changes in the original EEI-IBEW draft, particularly the change in scope.

August, 1984

IBEW President, Charles Pillard, writes to Barry White stating that both EEI and IBEW were opposed to expanding the scope of the standard beyond the electric utility industry. Mr. Pillard reminds White of his statements in support of this concept at an EEI-IBEW-OSHA meeting on November 3, 1983.

August, 1984

EEI meets with Pat Tyson, Deputy Assistant Secretary of OSHA to discuss the standard. Tyson promises action.

August, 1984 to February, 1985

EEI and IBEW begin a new series of meetings to review, edit and supplement the OSHA draft. Finally, a new second draft is completed which has the endorsement of EEI and IBEW.

February, 1985

EEI's Carl Behnke and IBEW's Bob Macdonald present to Barry White a new draft on which both parties agree.

August - October, 1985

EEI and IBEW begin meetings with Barry White and OSHA's Electrical staff to review the draft submitted to OSHA in February. White promises a proposal in the Spring of 1986. After the meetings, OSHA states that yet another new draft will be prepared as a result of the discussions. OSHA also states that no one will be allowed to see the draft until it appears in the federal register.

March, 1986

Melodye Turek obtains copies of portions of the new draft which OSHA has prepared. OSHA has released these pages to an ANSI Committee, but refuses to let EEI and IBEW representatives see the draft which OSHA prepared as a result of the joint meeting in 1985. OSHA promises a proposal in the Fall of 1986.

June, 1986

Joe Pipkin, Head of OSHA's Electrical Section addresses EEI OSHA Task Force and states that a proposal is scheduled for the Fall of 1986. He has a copy of the new OSHA draft proposal, but will not give EEI or IBEW a copy.

July, 1986

OSHA publishes final rule on Electrical Construction; Subpart K.

August, 1986

EEI representatives meet with John Pendergrass, Assistant Secretary of OSHA to discuss Subpart K. EEI points out that Subpark K is another example of the problems that continue to arise in lieu of a vertical standard for electrical utilities.

September, 1986

Steve Yohay and Melodye Turek meet with Frank White, Deputy Assistant Secretary of OSHA to discuss Subpart K and the Maintenance Standard.

December, 1986

Representatives from EEI, American Public Power Association and National Rural Electric Cooperative Association meet with Frank White and other OSHA representatives to discuss Subpart K. OSHA is reminded of the problems which continue to plague electric utilities in the absence of a vertical standard.

The CHAIRMAN. Let me come back to the response to the Senator from Utah's question about benzene. Dr. Landrigan, who was here day before yesterday, was a leading health expert at NIOSH, and this in response to questions: "Now, I realize this is not a hearing on the Supreme Court, but for the purpose of this afternoon's hearing, it is important to recognize that by 1981, only one year after the Supreme Court decision, OSHA had obtained sufficient information from several diverse sources to effectively have reversed the Supreme Court decision. By 1981, OSHA's own staff had completed a quantitative assessment of the risk of leukemia associated with occupational exposure to benzene; another quantitative estimate of the risk of leukemia in persons occupationally exposed to benzene was completed in 1981 by the International Agency for Research on Cancer of the World Health Organization."

The medical testimony is that you had sufficient information long, long ago—you said five or six years——

Mr. BAROODY. Yes.

The CHAIRMAN [continuing]. The leading health expert at NIOSH indicated they had it then.

Mr. BAROODY. I would ask my colleagues to add. My point is not that the health scientists simply take too long; it is that there is more involved in producing a rule that will pass final muster.

The CHAIRMAN. Well, not five years, not five years.

Let me go on—and I agree with Senator Metzenbaum. If you had gone through an inspection without a warrant, wouldn't you be in violation of the law—yes—well, isn't that tragic—in front of the cameras. You asked for the warrant. You could have asked for that warrant weeks ago. And the idea that you are listening to your Solicitor, who said he doesn't believe that, is a lot of hogwash. You run it; or if you don't run it, you shouldn't be in it. And if that Solicitor General won't get it, get another one who will. That is what this is really about, I believe, and I just think you can find other reasons or justification, but I find it very difficult.

We will take a short recess and come back. I have just a few more questions.

[Short recess.]

The CHAIRMAN. We will come to order.

Just going back for a moment to Mr. Barry White and the discipline of Mr. White, how would you describe his position? Is he in a policymaking position?

Mr. WHITE. He is a senior manager in the agency, yes.

The CHAIRMAN. So he is. Well, under the statute, 7511, it defines what can be done with various Federal employees. You can put a letter in his file; he can be suspended for a period of time. And it says, "This chapter does not apply to an employee on the second section whose position who has been determined to be of confidential or policy-determining, policymaking or policy-advocating character."

And then in the other statute—this is Title V, 7511 U.S. Code—"except service employees are ordinarily considered to be at will employees and are thus not entitled to statutory procedure protections against discharge, according to Federal employees in competitive service."

Mr. **White**. Mr. White is a career civil servant, serving in a career Senior Executive Service capacity, so I don't know to what extent those provisions you just cited apply. I can certainly——

The **Chairman**. Well, I have got the statute right here, and it is really quite clear. Do you know whether this statute was reviewed?

Mr. **White**. I can assure you, Senator, that I consulted very carefully with our administrative and personnel people on this issue, and I value their advice, and I would be happy to take those references and make sure that our people reviewed those as well.

The **Chairman**. All right. Well, would you give us a note by the end of the week on that, and we will include it as part of the record?

Mr. **White**. Sure.

[Information supplied for the record follows:]

Hearing response - page 1

BACKGROUND DESCRIPTION ON MR. BARRY J. WHITE

Barry J. White is a Senior Executive Service member in the career service with OSHA, currently serving as the Director of the Directorate of Safety Standards Programs. He was appointed to the Federal service in 1963 and has spent his entire professional career serving the public in the U.S. Department of Labor. He joined OSHA in 1971 and has held a variety of progressively more responsible program and administrative positions. He has had an unblemished record of service and achievement and his previous performance has been such that he has received performance awards for his contributions to the Agency's safety and health programs.

I had grave concerns about the incident regarding his comments at a conference held by the American Meat Institute. I seriously questioned Mr. White's judgment and his continued ability to act as an effective Agency spokesman on issues not relating directly to particular safety standards projects. My thorough review of this matter commenced with imposing an immediate limitation on Mr. White's public appearances and statements on behalf of OSHA to those matters essential to the development and issuance of safety standards by the Agency as well as obtaining his accounting of the events reported in the print media. Mr. White fully reported on these matters and assured me that he not only understood the seriousness and unacceptability of such conduct but that he would make a full and unequivocal commitment to avoid such aberrant behavior in the future.

I called upon OSHA administrative officials whose full time professional positions require that they be knowledgable of the body of laws, rules, regulations and precedents in the areas of disciplinary and performance issues and facile in the application and interpretation of such provisions in my efforts to identify the most appropriate course of action available to address Mr. White's conduct. They presented a distillation of the most relevant and significant parts of these rules, provided guidance with regard to the parameters of my options and defined Mr. White's rights under the protections for SES members subjected to disciplinary or performance based actions. * They provided their guidance with respect to the applicable sections of the Chapter 75 of title 5, United States Code, Subchapter V, §§ 7541 - 7543; Chapter 43 of title 5, United States Code, Subchapter II, §§ 4311 - 4315; and Chapter 35 of title 5, United States Code, Subchapter V, §§ 3592 and 3594. They brought to my attention the U.S. Office of Personnel Management implementing regulations contained in the Code of Federal Regulations, 5 CFR 752, 430 and 359 as well as Department of Labor regulations. Further, they provided their professional advice and guidance with respect to the various cases that had come to their attention involving disciplinary and adverse actions and actions based on inadequate performance. * I was guided and persuaded by their advice in these matters even reserving to myself the final authority and judgement as to what actions would be appropriate in this matter.

In deciding upon the course of action which would most appropriately address this conduct, I considered a number of factors to assure that my actions would be properly exercised within tolerable limits of reasonableness and proportion. In balancing the need to impose an action that would be effective, yet not punitive or excessive, I took into consideration Mr. White's job level and responsibilities _vis a vis_ the nature and serious of the offense as well as the effect of his actions on my confidence in his ability to perform his assigned duties. I believe that Mr. White understood the clearly enunciated Agency position and policy with regard to the matters he addressed. Nevertheless, the option of a more severe action was mitigated by a number of other considerations which included Mr. White's work history and performance in his assigned duties and his clear potential for rehabilitation evidenced through his unequivocal acknowledgement of serious error, sincere pledge to avoid such behavior in the future and commitment to cooperate in my directives concerning future Agency representational activities. In sum, I determined that the actions I identified from a number of alternative sanctions most adequately and effectively addressed the matter. I believe that my decision to limit his public appearances and the range of matters about which he may offer Agency policy and position, and Mr. White's acknowledgement of his serious error and pledge to avoid such a mistake in the future, reasonably achieve my legitimate need to correct this problem and castigate Mr. White for such conduct. Additionally, this matter will be taken into account in Mr. White's executive performance appraisal for fiscal year 1988 and any similar breaches of unacceptable performance would have serious adverse consequences.

Mr. PENDERGRASS. Mr. Chairman, may I take just a moment to clarify something which may be a misunderstanding. You had held up a document which I had not seen in regard to personnel, and I want to clearly state, if I may, where we are and how things are counted.

In the document which you had, in the lower left-hand corner there is a list of compliance officers, safety, health, et cetera. That is not a staffing document. This is for activity in the Department. At the hearings, I think it will show that we have, as of 12-31-87, 1,038 compliance officers onboard. This number includes all of the people who do compliance inspections. Some of them are not journeymen. They are in an on-the-job training category. The count is the same that it has always been in presenting the evidence to the Senate or to the House with regard for staffing.

The CHAIRMAN. Well, I don't know what the word of art is—"activity in the Department"—which you are defining. But what we have here are actually the inspection sheets and those who are doing the inspections. That is this document. So I don't know what the differential is between these inspection sheets and as you just mentioned, "activity in the Department".

These numbers I have given are actually the inspection sheets provided by the agency.

Mr. PENDERGRASS. Well, I just didn't want there to be some misunderstanding.

The CHAIRMAN. Yes, but it makes a difference because I believe that yours are inflated numbers, and I believe that these are the inspection sheet numbers of the people who are actually doing the work. And I think that ought to be the guiding figure. But you can make your best case, and it will be a part of the record, and I will just put these in the record.

Now, Mr. Pendergrass, with regard to the methods of compliance program, we heard strong testimony from Dr. Landrigan, Dr. Weiner and Mr. Martonik. All of them have said there is indisputable evidence that engineering controls are feasible, are more protective and more desirable than respirators. And the Office of Technology Assessment has taken the same position; they believe the methods of compliance policy is fine the way it is and does not need revision. They are concerned that if the policy is opened up, that the circumstances in which respirators could be used instead of engineering controls might be expanded.

Dr. Weiner testified that despite the overwhelming evidence in favor of the current policy, OSHA published an Advance Notice of Proposed Rulemaking in 1983 on the methods of compliance, at the urging of OMB, and that OSHA subsequently analyzed the comments received from it.

So here you have in place what is scientifically the best way to protect workers, and here you have OMB, urging that they open up this whole process.

Then there was forwarded an options memo to the Policy Review Board, strongly recommending that—and I quote—"in the absence of specific data and well-documented arguments opposing OSHA's present policy in the face of overwhelming scientific, professional and industrial support for it, it is not possible to justify the erosion of an effective working system"—pretty good up to here.[1]

Then I understand you attended a meeting of the Policy Review Board on November 20th, 1986, at which your memo was discussed. And I understand further that you stated it was a basic axiom of industrial hygiene that engineering controls were preferable to respirators.

Do you remember that?

Mr. PENDERGRASS. Yes, sir, I do.

The CHAIRMAN. Okay. We have the minutes here.

[Excerpt from the minutes of November 20, 1986 follows:]

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[1] Document appears earlier in the Committee record.

M I N U T E S

POLICY REVIEW BOARD

November 20, 1986

ATTENDEES: Messrs. Baroody, Maroni, Pendergrass, Salem, Adkins, Ms. Attwood, Clair, Copeland, Doranz, Ms. Eckhart, Inzana, R. Johnson, Katen, McCully, Ms. Morris, Siskind, Suhrbier, F. White, Zeutenhorst

Mr. Baroody first asked if OSHA anticipated any difficulties in meeting the schedule of upcoming actions attached to today's agenda. Mr. F. White indicated that OSHA was on schedule for all of the upcoming PRB meetings, except possibly for Medical Surveillance Programs, and he did not know of any problems with meeting the schedule for upcoming regulations. Mr. Baroody asked that OSHA obtain positive confirmation on these matters and give considered comment on the meeting of schedules at the 11/26 PRB meeting.

Hazard Communication Standard in Federal Sector

Mr. Pendergrass said he did not see any problems with the proposal. Mr. McCully summarized it and there was discussion of various points. Mr. Pendergrass noted that OSHA is not insisting on special labels for federal supplies--OSHA wants the same labels as are used in private industry. It was observed that Lane Kirkland and Ken Blaylock have both written to the Secretary in support of the proposal.

Ms. Eckhart asked if the money needed for OSHA's proposal was already in the budget. Mr. Pendergrass indicated it was not, but added that the project could be phased-in to ease the budgetary burden. Ms. Eckhart expressed concern that the Secretary would be sending letters to the agencies seeking their cooperation in a project which would need scarce discretionary funding. Mr. Baroody shared that concern and suggested that OSHA take another look at the matter of the Secretary's letter.

After further discussion, Mr. Baroody concluded that there were no objections to OSHA's going forward with the project. He said they should coordinate budgetary aspects with OMB and adjust the Secretary's letter as needed. He also endorsed inclusion of the project in the President's Management Improvement System.

* * * * * * *

Mr. White stressed that the goal of the proposal is to develop more performance-oriented criteria for respirator use. He noted, however, that it is often difficult to measure the effectiveness of respirators, especially when there are no readily available medical indicators to determine if there has been significant adverse exposure.

Mr. Baroody questioned why mandatory, specific criteria would be needed on fit-testing if employers met the required level of performance. Mr. Pendergrass indicated that OSHA could reevaluate the language on this. Mr. Baroody determined that the question of whether to have a mandatory or nonmandatory appendix has not been resolved and that more time would be needed for consideration of it.

After further discussion by Mr. Adkins of the changes, Mr. Baroody invited MSHA staff to make comments. Mr. Katen described MSHA's policy on respirators. MSHA sets minimum criteria for employers to meet but encourages them to exceed these minima. Mr. Pendergrass and Mr. White affirmed that this is OSHA's basic policy also.

Mr. Baroody then raised an issue that relates to the "Methods of Compliance" item, next on today's agenda. He stressed the importance of setting a new respirator standard that would remain vaild, regardless of how the primary of engineering controls, issue is resolved. The new standard, instead of making a policy statement on engineering controls, could simply reference the part on Methods of Compliance (1910.1) and apply whatever was said there about primacy. This would make for a more durable regulation, whether 1910.1 changes or not. Mr. White agreed to see if the language could be adjusted regarding this.

Mr. Baroody said the Board would revisit the respirator standard as soon as possible and asked that his staff and OSHA schedule the revisitation expeditiously.

Methods of Compliance

Mr. Pendergrass, saying he would have to leave the meeting shortly because of a prior commitment, stressed that in this area OSHA needs to maintain its credibility. [redacted] policy. He pointed out that, before citing an employer, OSHA must show that engineering controls were feasible for the worksite in question. [redacted] less than 3 percent--and [redacted] for contests involving engineering controls [redacted]

Mr. Baroody said that the record cited shows that some employers have a policy of favoring engineering controls, some do not. We asked to what extent the former were driven by OSHA's past policy emphasizing engineering controls. [redacted] response to Mr. Baroody's question, Mr. Adkins felt that OSHA's policy has not driven employer policy on engineering controls.

[redacted]. OSHA stated that it is far easier to measure the effectiveness of engineering controls than of respirators. Mr. Pendergrass said that reliance on personal devices does not always create an acceptable work environment. Mr. White added that engineering a safe environment is inherently better than providing workers with respirators in a toxic one. Ms. Eckhart suggested that there must be cases where engineering controls are not cost-effective. Mr. Salem suggested it be stipulated that, ordinarily, personal devices are cheaper. [redacted] Mr. White agreed with that but said he had no evidence that requiring engineering controls was seriously hurting any industry.

[redacted]. Mr. White responded that this would compromise safety and health. OSHA cannot say that respirators are as good as engineering controls. Mr. Adkins gave an example of a lead smelter that relied on respirators and the workers had excessive blood lead levels. When engineering controls were installed the levels were cut in half and fell below OSHA's allowable maximum.

[redacted] He said that more study and discussion will be needed before a decision can be made and he called on ASP staff to work closely with OSHA.

Mr. White observed that the Task Force was primarily reacting to regulatory policies of the previous Administration and said it was not clear what the rationale or intent of its recommendations were in relation to current policy. He stressed that engineering controls are generally the best way to go, but that they can be flexible.

Mr. Maroni recommended that a decision be made quickly. He noted that [redacted].

Mr. Baroody asked why OSHA should have a pro-engineering controls policy and then have to make a lot of exceptions to it. He did not question that engineering controls are generally more effective, but argued that personal devices could, in many instances, be equally effective [redacted] Mr. White responded that OSHA has been very flexible in the past and has usually accomodated the concerns that any given industry had about engineering controls. Furthermore, [redacted].

Mr. Copeland suggest that this issue be revisited at the December 11th PRB meeting. Mr. Baroody agreed, but indicated it should be sooner if possible. He noted that the Vice President's Task Force is being reconstituted and suggested that all concerned find out what new views the Task Force may have on OSHA.

Did Mr. Baroody agree with you?

Mr. PENDERGRASS. Mr. Chairman, as has been indicated earlier, the Policy Review Board meetings are an open discussion of whatever is proposed. Mr. Baroody's style of chairing those meetings is to ask questions, to ask very searching questions, to invite anyone who is there to question what has been proposed. That exchange will go on; sometimes a consensus is arrived at, sometimes it isn't. We may even address a question on more than one occasion.

The CHAIRMAN. All right. Well, Mr. Baroody, are you a scientist?

Mr. BAROODY. No, sir, I am not.

The CHAIRMAN. Are you an industrial hygienist?

Mr. BAROODY. No, sir.

The CHAIRMAN. At the meeting, as I understand, Mr. Baroody, you took issue with OSHA's strong recommendations against changing the policy, and you cited comments from major industries that engineering controls were not desirable, and you asked why OSHA should require any particular approach; is that correct?

Mr. BAROODY. Yes, sir, I did.

The CHAIRMAN. The positions that you took at the meeting, were they based upon scientific and health policy issues or upon economic considerations?

Mr. BAROODY. I think they were based on longstanding debates within the regulatory economics community about the efficacy of engineering controls over performance orientation.

The CHAIRMAN. Well, the scientists have no doubt that what was in effect provided the best protection for workers. Now, I don't think we are drawing unwarranted conclusions in reviewing the minutes of the meeting to draw the conclusion that you were talking about economic considerations here and a change in those.

Mr. BAROODY. But not at the cost—I was asking the question whether such a—as was under discussion—more neutral statement on methods was conceivable to them, knowing what their views were and how strongly-held, that could be conducted without cost in terms—I don't mean monetary cost—without losing protection for workers.

And the reason for that was two- or three-fold, if you will indulge me, sir. In the first instance, my understanding of the history of methods is that it was incorporated, as were so many other policies, at the beginning. John has already testified I talked a little bit about the necessity to update some permissible exposure levels that are now 19 years old.

The methods of compliance policy was put in place and never subject to notice and comment, and we think it right to ask the question——

The CHAIRMAN. I want to have you just answer the questions, and then whatever editorial comments—I just want to try and get the facts out with regard to who recommended what, when, and then you can have all the time to explain it.

But you did suggest to Mr. Pendergrass to reconsider the recommendation that had been made by the Assistant Secretary of Labor, is that correct, to the Policy Review Board—is that correct?

Mr. BAROODY. I don't know the context, but clearly, I was suggesting that they go beyond the proposal they had come with.

The CHAIRMAN. All right. And Mr. Baroody, did you subsequently have meetings with OMB at which a decision was made that a proposal would be issued by OSHA?

Mr. BAROODY. Yes. In fact, we had—I'll defer. I am sorry.

The CHAIRMAN. And did OSHA agree to issue such a proposal, as you stated in your memo dated 12-87? [1]

Mr. BAROODY. The question of proposing a policy on methods of compliance, a proposal on methods of compliance, had been dealt with in the regulatory program, the schedule Senator Metzenbaum referred to earlier, that I had reference to in my memo for several years.

The CHAIRMAN. And Mr. Pendergrass, did you agree to issue a proposal?

Mr. PENDERGRASS. Yes.

The CHAIRMAN. And do you still agree with it?

Mr. PENDERGRASS. Yes.

The CHAIRMAN. But you just recommended the other way, strongly.

Mr. PENDERGRASS. No. You asked if I agreed to issue a proposal. The proposal was—is—that the preference as far as OSHA is concerned is for engineering controls. However, the docket did contain some consideration by others that a more flexible policy was called for.

I am quite confident, Mr. Chairman, that we can have a proposal, we can have hearings, and my professional judgment would be that engineering controls will be preferred. However, I think it is eminently fair that in spite of my feelings, in spite of the feelings of our scientists, that we let other people speak up.

The CHAIRMAN. All right. Well, now, let me just review. You make the statement: "In the absence of specific data and well-documented arguments opposing OSHA's present policy, in the face of overwhelming scientific, professional and industrial support, it is not possible to justify the erosion of an effective working system."

Now the facts are Mr. Baroody makes some recommendations and suggestions to alter that policy, and you agree in terms of doing a new proposal. That's where we are. You can explain it in any particular way, but that's where we are. That's where we are.

Mr. PENDERGRASS. Mr. Chairman, where we are is allowing the public to comment on a proposal, which we recommend——

The CHAIRMAN. All right. But you didn't say that initially, did you?

Mr. PENDERGRASS. Other evidence came forth——

The CHAIRMAN. Prepared by——

Mr. PENDERGRASS [continuing]. From the docket.

Mr. BAROODY. No, no. Notice and comment—items which represented the comments submitted by the regulated public to the docket on the basis of the initial ANPRM published in 1983.

Mr. WHITE. Let the record show, Senator, that the proposal proposes to retain the hierarchy. That is what the proposal does. It proposes no change in the hierarchy. It invites comments on other issues.

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[1] Document appears earlier in the Committee record.

The **Chairman**. Now, I understand that Dr. Weiner afterwards sent a long memorandum opposing any alterations or changes; is that correct—additional information?

Mr. **Pendergrass**. I don't know.

Mr. **White**. There was an additional document submitted to the PRB, that's correct.

The **Chairman**. How long was that document?

Mr. **White**. As I recall, of the nature of 30 pages or something.

The **Chairman**. Well, it was extensive, and as I understand that the principal scientist again strongly recommended the maintenance of the proposal.

Then there was a meeting of the Policy Review Board on October 8, 1987, that OSHA should rewrite its proposal to clarify the circumstances in which employers for extensive use of respirators may be appropriate.

[The minutes of October 7, 1987 follow:]

MINUTES

POLICY REVIEW BOARD

October 7, 1987

ATTENDEES: Messrs. Baroody, Demarest, Maroni, Pendergrass, Salem, Adkins, Copeland, Droitsch, Ms. Ecknart, Jacoby, R. Johnson, MacLaury, Siskind, Sweezy, F. White

Mr. Baroody opened the meeting at 10:08 a.m. and observed that the only agenda item was OSHA's "Methods of Compliance" proposal. [redacted]e. At that time OSHA noted that its generic respiratory protection rule needed attention first. That revision having gone forward, the agency has now turned its attention to methods of compliance.

Mr. Pendergrass circulated at the meeting copies of a draft proposed rule on methods of compliance. He discussed the [redacted] Mr. Baroody observed that with that many options the proposal would seem more like an ANPRM. Mr. Baroody noted that OSHA, in a number of specific standards, spelled out instances in which employers were allowed to use methods other than engineering controls to comply. [redacted]

Mr. Pendergrass said that OSHA, through its generic approach to rule-making, was trying to get away from undue specificity in its standards. He stressed that excessive specificity can lead to less, not more, flexibility.

Mr. Baroody noted that in the ETO rule the burden of proof is on OSHA to determine when engineering controls are to be required. OSHA staff pointed out that OSHA generally does have the burden of proof in this area due to the feasibility requirement.

[redacted] He said that OSHA's policy that engineering controls are primary, where feasible, was generally accepted by the industrial hygiene community. Mr. Pendergrass noted that OSHA's policy is that engineering controls must be used if they are feasible both technologically and economically; if they are not feasible, then OSHA does provide flexibility on the means of compliance.

Mr. Baroody agreed that primacy of feasible engineering controls is proper and accepted OSHA policy. Within that framework, however, [redacted]. He suggested that OSHA narrow its four options down to its [redacted] Mr. Baroody stressed that it would be more productive to have detailed comments on a limited number of options than to have more diffuse, diluted comments on a larger number of options.

[redacted]. Mr. Baroody and Mr. Salem offered to provide staff assistance to OSHA in developing this revision. The Board indicated that it expects to receive and address the revision by October 31, 1987.

The CHAIRMAN. Were you trying to open the door for additional circumstances which would allow the use of respirators, Mr. Pendergrass?

Mr. PENDERGRASS. Mr. Chairman, the hierarchy of controls has always permitted the use of administrative controls in personal protective equipment. In practice, certain things were done by the compliance officers as they evaluated the use of engineering controls or personal protective equipment.

The effort as a result of the PRB was to state what those were, so that the public would be better aware of when OSHA would consider personal protective equipment satisfactory and also to give the compliance officers some better guidance as to what this is—in other words, to put it into writing.

The CHAIRMAN. Well, Mr. Pendergrass, a third draft of the proposal then was prepared, based on Mr. Baroody's recommendations, and Randy Johnson of the Solicitor's Office then wrote a memorandum, recommending that OSHA should ask whether two additional exemptions should be added to that policy.[1]

Who is Randy Johnson?

Mr. PENDERGRASS. Mr. Johnson is in the Solicitor's Office.

The CHAIRMAN. Is he a scientist?

Mr. PENDERGRASS. He is an attorney.

The CHAIRMAN. Is he a health professional?

Mr. BAROODY. No, sir. There are more than health issues involved in this question.

The CHAIRMAN. Well, it is very clear to me there is—very, very clear; very, very clear.

Mr. BAROODY. And I think quite legitimate ones, Senator.

The CHAIRMAN. This is very clear.

They were not so persuasive in the initial part of the process when Mr. Pendergrass thought it should not be altered or changed.

So we have got a third draft, and then we have the intervention of the Solicitor. And at a Policy Review Board meeting on January 21st, 1988, the Board decided to include questions regarding two new exemptions in the proposal, even though——

Mr. BAROODY. Per the discussion of the PRB previously.

The CHAIRMAN [continuing]. Even though Frank White noted at the meeting that doing so would, quote, "place OSHA in a difficult position".

[The minutes of January 21, 1988 follow:]

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[1] Document appears earlier in the Committee record.]

MINUTES

POLICY REVIEW BOARD

January 21, 1988

ATTENDEES: Messrs. Baroody, Maroni, Pendergrass, Salem, Adkins, Ms. Attwood, Clair, Copeland, Droitsch, Ms. Eckhart, Goodwin, Jacoby, R. Johnson, MacLaury, Ms. Morris, Riley, Ms. Silvey, Thorn, F. White, Witt

Mr. Baroody opened the meeting at 10:05 a.m. and noted that there are two items on the PRB "fast track": a final ESA rule on labor standards under the National Foundation on the Arts and Humanities Act, and an OSHA options memorandum on maritime gear certification. Regarding the latter, he suggested possibility of removing the item from the Regulatory Program since no regulatory action is planned until 1990. OSHA agreed with him.

Methods of Compliance - OSHA

Mr. Pendergrass discussed OSHA's options memorandum outlining five general conditions under which reliance on respirators rather than engineering controls would be acceptable. These included: 1) while installing engineering controls; 2) where engineering controls alone cannot achieve acceptable exposure levels; 3) during emergencies, repairs and shutdowns; 4) for operations requiring added protection or where there is the possibility of failure of normal controls; and, 5) for entries into unknown atmospheres.

In addition, Mr. Pendergrass noted that the Solicitor's Office has raised for discussion two additional conditions where respirators would be allowed: 6) for specified short-term exposures (STEs); and, 7) when the cost of engineering controls is determined to be excessive relative to that of respirators, in situations where respirators provide adequate protection.

Regarding 6) above, Mr. Pendergrass felt that this was already covered in the 5-point proposal. Mr. Baroody suggested that the STE issue be raised explicitly in either the preamble or the body of OSHA's proposal so that there could be public comment on it. MSHA staff discussed experience they have had in dealing with similar issues in their regulations.

After extended discussion, OSHA agreed to the Board's recommendation that there be included in the preamble a full discussion of the STE issue and a call for comment thereon.

And then Mr. Pendergrass, was the proposal changed to include these exemptions—just yes or no.

Mr. PENDERGRASS. I am not sure that I can answer that—but there is a proposal that includes things that were not in the original.

The CHAIRMAN. All right. Just for the record, these two exemptions were included——

Mr. WHITE. Senator, for clarification, they were not included in the proposal. We were not proposing to make those modifications. We were raising for comment in the preamble those questions.

The CHAIRMAN. All right. But it was a change in the policy which included these two.

Mr. PENDERGRASS. No, sir, it is not a change——

The CHAIRMAN. The proposal—there was a proposal to alter the policy to include these two exemptions.

Mr. PENDERGRASS. It is a proposal for rulemaking to clarify the hierarchy of control. Our recommendation remains exactly the same that it has always been. We make a recommendation; we offer an opportunity for the public to comment; we consider that comment in making a final rule.

The CHAIRMAN. Well, you can go around it any particular way, but I believe that the facts show very clearly you had something which was scientifically sound. Then there were meetings that were held in which recommendations were made by individuals who did not have the health and scientific background on this issue which was of such enormous importance in terms of protecting workers, that was targetted by OMB, and there was at least the proposal—whatever terms you want to put it in to change the policy list. But there is no question in anybody's mind that if these two proposals were put into effect, it would have altered the standard, and this is what Dr. Weiner said, who is the principal science and health advisor.

The question is: "In your opinion, would these additional elements result in a major change in OSHA's review of engineering control versus respirators?"

Dr. WEINER. "Yes. They would completely change the thrust of our compliance activity."

The CHAIRMAN. "So, if adopted, would the suggested changes severely weaken OSHA's ability to enforce engineering control requirements?"

Dr. WEINER. "Yes. I think it would make it very difficult, if not in many cases, impossible."

The CHAIRMAN. "Mr. Martonik"—he is another employee of OSHA and the director of the program in terms of health science—"is that a crucial requirement for protecting the health of workers?"

Mr. MARTONIK. "Yes, it is, without a doubt."

The CHAIRMAN. "Mr. Martonik, do you agree with Dr. Weiner's testimony up to this point?"

Mr. MARTONIK. "I do."

Now, you can put whatever tone or spin on this that you want, but you come to certain basic conclusions—that you have an effective standard in place—maybe an old one, but it is an effective one. It is supported by the scientific and health community within your agency. An agency of Government, OMB, recommends a change. You go through a series of different meetings and listen to the recommendations of the non-scientists, non-health professionals on it, who in effect are trying to override the scientific and health advice that is essential to protecting American workers in these industries where this particular rule has been in effect.

Now, if you want to take those facts and come at it in a different way, I'd be glad to hear from you, but otherwise I'd like to go on into some other areas.

Mr. PENDERGRASS. Well, I'd like to respond to that, Mr. Chairman, because first of all, this is not a change in policy; it is not a change in practice. This is an opportunity for those who are concerned, the constituents, the health and safety community, to comment on whether or not it is advisable to change the procedures.

I have no fear whatsoever in letting the public comment on what we should do or should not do. The recommendation of OSHA in that proposal is to retain engineering controls as the primary method of control.

Our recommendation is no different, but we are giving the public a chance to comment, and that is what the Act provides for. And I think we would be remiss if we shut our ears to what other people are commenting on.

The CHAIRMAN. Well, no one wants to exclude the public, but the fact is you were in effect trying to override the health and scientific community and the basis of scientific information——

Mr. PENDERGRASS. No, Senator——

The CHAIRMAN. People will have a chance to examine this record——

Mr. PENDERGRASS. Mr. Chairman, I am not trying to override anybody. Their beliefs are prime; they are stated that way, and I think that they will stand up to any comment.

The CHAIRMAN. Well, why didn't you say that when you were first asked about it? Why did you say in the very beginning that you supported the existing regs?

Mr. PENDERGRASS. I did, and I still do.

Mr. BAROODY. There has never been any doubt about John's position, Senator. I was never in doubt.

The CHAIRMAN. Sure. Let's go to Hazard Communication. In October 1987, the Office of Management and Budget sent the Labor Department a 14-page letter disapproving major provisions of the new Hazard Communication Standard for nonmanufacturing workers under the Paperwork Reduction Act. Ms. Silk testified that OMB had tried to change those same provisions just a few weeks before in the rush to publish the standard before a court ordered deadline, in her testimony. She had testified that those changes would make the standard less protective. Do you agree? [1]

Mr. PENDERGRASS. We have objected to those suggested changes. We think our standard was a good one.

The CHAIRMAN. In its letter, OMB threatened to render the entire Hazard Communication Standard unenforceable if OSHA did not reopen the standard to consider the changes. Is that right?

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[1] Document appears earlier in the Committee record.

Mr. Pendergrass. I don't know whether the exact wording—but they have responsibility under the Paperwork Reduction Act——

The Chairman. Well, that's what she testified to.

Mr. Pendergrass. Well, that's her testimony.

Mr. White. They laid down certain conditions for putting the standard into effect.

The Chairman. Okay. So in response to OMB's action, did your health scientists prepare an options memo for you? I believe they did. Here is a copy here, from Charles Adkins. In the memo it says: "As a general matter, we do not believe that any substantive information has been submitted to the record that warrants further rulemaking by OSHA."

[The memo referred to follows:]

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

NOV 24 1987

MEMORANDUM FOR: JOHN PENDERGRASS
ASSISTANT SECRETARY

FROM: CHARLES ADKINS
DIRECTOR
HEALTH STANDARDS PROGRAMS

SUBJECT: Hazard Communication: Response to Issues Raised and Recommended Actions

As you requested, we have reviewed the comments submitted since the final Hazard Communication Standard (HCS) was published on August 24, as well as the transcript of the meeting on the paperwork provisions conducted by the Office of Management and Budget (OMB) on October 16. A detailed summary of both the comments and the transcript were provided to Frank White on October 30. The purpose of this memorandum is to discuss further the more significant issues of concern, our response to those issues, and our recommendations for further action.

[redacted] here are some issues that may need to be addressed through policy statements or enforcement guidelines. It may also be desirable to publish such determinations in the Federal Register to assure the information is available to the broadest possible audience. It is clear from the arguments raised in the comments that there is a considerable lack of understanding among the newly covered industries as to what requirements apply to them, and what is required for compliance. The Agency should be prepared to undertake educational activities for these organizations to assist them.

This memorandum cannot be considered a comprehensive response to the issues raised in the OMB letter. We believe that such a response should be prepared with specific documentation from our rulemaking record. The OMB letter ignores our record, distorts the issues, and contains a number of conclusions that are based on misstatements of fact. That being the case, it is incumbent upon OSHA to prepare a substantive response based on an analysis of the entire record, as well as the Agency's experience in implementation of the current rule.

Grain Industry Position

Approximately half of the comments received were submitted by representatives of the grain industry. As you know, the National Grain and Feed Association (NGFA) has petitioned the District of Columbia Circuit Court of Appeals for review of the standard. The majority of the comments received on the application of the rule to grain dust were form letters from grain elevators in North Dakota or local branches of the NGFA.

The primary position of the NGFA and other grain industry representatives is that grain dust should not be covered by the HCS. In general, they do not object to the rule covering their facilities, but do object to grain dust being considered a hazardous chemical under the standard. The argument they have developed is that OSHA has inappropriately delegated its rulemaking authority to the American Conference of Governmental Industrial Hygienists (ACGIH) by referencing the latest edition of the Threshold Limit Value publication in the hazard determination procedures for the rule. These hazard determination procedures were in the 1983 original rule covering manufacturers, were based on the original record, and were not challenged by industry in the lawsuit that followed the standard's promulgation. Since grain dust (oats, wheat, and barley) was added to the ACGIH list after the 1983 rule was published, NGFA maintains that it is being regulated without an opportunity for prior comment; that OSHA has no information specific to grain dust in its public record on the rule; that OSHA is in effect adopting the TLV as a permissible exposure limit without going through rulemaking; and that grain dust should be considered nothing more than a nuisance dust.

It is clear from both the written comments and discussions we have had with NGFA representatives that they do not fully understand the hazard determination provisions of the rule, and have widely disseminated that misunderstanding, resulting in the numerous form letters we have received from the grain industry regarding adoption of the TLV. We have informed the NGFA that we have not adopted the TLV, and that even if grain dust did not appear on the TLV list it would be covered by the rule as it is, by definition, both a physical hazard and a health hazard. Furthermore, a number of their members are grain handling facilities that are classified in the manufacturing sector, and are thus not newly covered by the rule in terms of grain dust. We also requested that OHS prepare a material safety data sheet for grain dust, and submitted it to the docket to assist the industry to comply.

Certainly no regulatory action is required to address these concerns. There is another practical issue that has been raised, however, that may require further action in terms of a policy decision and enforcement procedure. The grain industry is objecting to labeling shipments of whole grain that will generate grain dust in handling at downstream facilities. Technically, a strict interpretation of the rule would require that they do so. There are some practical concerns as to whether that would be necessary. Further investigation of this issue and the development of policy options would be desirable. It should be coordinated with the Safety Standards staff working on the grain handling rule as they would be more familiar with the work operations involved and the potential hazards.

Assessment of Costs

A key argument of many of the commenters is that OSHA underestimated the costs of compliance, and thus the economic feasibility determination of the Agency is not valid. The Small Business Administration (SBA) hired a consultant to critique the cost estimates, and industry comments solicited and coordinated by SBA similarly attacked the cost estimates. The SBA consultant indicated that OSHA has underestimated the costs by 300%.

We requested that the Office of Regulatory Analysis (ORA) review the criticisms of the cost analysis, and respond to those comments. Their analysis is attached. As a general matter, the criticisms are not based on substantive information whereas our analysis is. Certainly variations in the assumptions made in the analysis would result in different conclusions. Also, policy decisions were made to change the estimates of the percentage of employees exposed in the various industries and the number of hours needed to prepare a written program. Those changes resulted in decreasing the costs significantly. However, even if the cost assumptions were modified and the estimates increased by 300% as suggested by the SBA, the rule is still feasible for every industry.

SBA also maintains that the numbers of chemicals per facility are grossly underestimated, thus resulting in lower costs. Their estimates are based on anecdotal evidence from two unidentified non-manufacturing concerns in Maryland. Our estimates are based on the National Occupational Exposure Survey (NOES) which involved nearly 5,000 plants. It is the best information available, and isolated instances of different figures do not warrant extensive revision of the OSHA approach.

SBA further criticizes the OSHA estimation of the cost of community right-to-know, and believes that assumptions made by the Environmental Protection Agency (EPA) in their analysis are better, although still low. We have reviewed the EPA assumptions and do not believe that they realistically reflect what will occur in the non-manufacturing sector. ORA does not believe that the SBA criticisms in this regard are valid. In any event, if the community right-to-know costs to industry are higher than OSHA, EPA, or even SBA have estimated, EPA and not OSHA has the authority and ability to amend the community right-to-know requirements.

Other comments submitted on the cost analysis were even less substantive than those raised by the SBA-related comments. Generally, they were made based on a cursory review of the preamble synopsis of the costs with no understanding of how those costs were determined. For example, a number of construction firms complained that the costs of training were not adequately analyzed. In fact, since training on hazards is already required in the construction industry the incremental cost of training for hazard communication was very low. The commenters assumed that no training is being done, and that many hours of training would be required to come into compliance. The costs of the HCS should not be assumed to include training to meet the existing requirements of s1926.21.

ORA has stated that even if we have underestimated the costs by a factor of 10, and we certainly do not believe we have done so, the rule would still be feasible based on our analysis of the costs compared to after-tax profits of each industry sector. If, for the sake of argument, we revised our cost estimates to reflect the figures we had prior to the policy decisions which resulted in the lower final figures, the rule's costs would be approximately three times the current figures and well within the range of feasibility. Changing the community right-to-know estimate to use EPA's assumptions would not be consistent with the model used in the rest of our analysis, and would not, we believe, accurately reflect the costs of compliance.

In any event, the comments regarding costs do not require any regulatory action.

Small Business Administration Position

The Small Business Administration (SBA) submitted comments on other aspects of the rule, and clearly orchestrated comments submitted by a number of trade associations as well as testimony presented at the OMB paperwork meeting. See, e.g., comments or testimony from the National Association of Homebuilders, Petroleum Marketers Association, National Association of Wholesalers/Distributors, American Subcontractors Association, National Paint and Coatings Association, and Service Station Dealers. In many cases, these organizations clearly supported specific SBA positions without knowledge of what they entailed, apparently assuming a "popular vote" on a provision would prevail. The SBA encouraged OMB to deny clearance of the paperwork package, and has stated that OSHA improperly promulgated the rule and inadequately addressed options to the provisions of the rule, particularly with regard to the impact on small businesses.

The SBA's primary concern was to attack the inclusion of material safety data sheet provisions in the rule. Their intent was to convince OSHA to eliminate such requirements from the standard for as many small businesses as possible, thus similarly eliminating the businesses from coverage under the community right-to-know provisions of the Superfund Amendments and Reauthorization Act (SARA).

SBA maintains that alternatives to MSDS requirements could provide as much protection, but none of the alternatives suggested do. Basically, they believe that generic information should suffice, rather than specifically providing employees with the right-to-know the identities and hazards of the actual materials they are exposed to in the workplace. For example, one suggestion was that each facility just develop lists of chemicals and keep general information on them in the facility. If the employer wished to have more specific information, MSDS would be available upon request from the manufacturer.

In no way does this type of alternative provide equal protection to workers in the affected industries, or meet OSHA's mandate to protect employees to the extent feasible. In particular, our rulemaking record indicates that a comprehensive program of labels, material safety data sheets, and training is required to be effective. These components are inextricably interdependent. Acquisition and maintenance of material safety data sheets in the non-manufacturing industries is feasible--the fact that some employers may not wish to meet the requirements does not demonstrate that it cannot be done. Furthermore, the fact that data sheets contain technical information does not render them useless in small facilities as suggested by the SBA.

We agree with SBA that OSHA should devote resources to educating the public concerning what needs to be done to comply with the rule. Certainly the Agency should provide staff to speak to organizations sponsoring seminars concerning the rule. An intensive training course for regional Hazard Communication Coordinators and other OSHA staff is going to be conducted at the Training Institute in December. We expect to increase the Agency's capability to respond to speaking requests and other requests for assistance by providing this training and written materials to approximately 25-30 people. It may also be desirable for the Agency to co-sponsor seminars with professional societies such as the American Conference on Chemical Labeling. OSHA did this after publication of the original rule, and it was very well-received. Unfortunately, the Agency never devoted the resources necessary to continue such activities.

The SBA and its supporters have endorsed the Federal Hazard Communication Program as a means to provide assistance to the regulated community. In the abstract, this is certainly reasonable. OSHA could easily provide the program to the National Audio-Visual Center to make it available to the public. This should be done as soon as the training materials for the program are available in January.

There is, however, a basic misconception concerning the contents of this program and its applicability to the small businesses of concern. The Federal government is not a small employer, and has extensive safety and health resources available to it to administer hazard communication programs in Federal establishments. Although a generic program is being developed, it is a very sophisticated program that will require use of these considerable resources to implement. It is not, as suggested by the SBA, a simple fill-in-the-blank type approach. There is a guidance manual which includes a sample written program that could be characterized as a fill-in-the-blank approach, but considerable work would have to be done to design the program prior to completing the form. Furthermore, there is a series of videos concerning various types of hazards and the components of the program, as well as a detailed training guide to tailor the training program to the workplace. Certainly this information could be helpful to anyone trying to implement a program, but it would require a lot of work to adapt it to the individual workplace involved. And that adaptation would have to be done at the workplace level, not on a generic basis by OSHA.

In addition to making the materials available through the National Audio-Visual Center, OSHA should plan to develop some simple materials to "walk" employers through the standard. As an initial step, it would be very useful to ask the State Plan States which have already expanded the scope to send us a copy of the materials they have developed. We know that several of the States have devoted considerable effort to developing such materials, and it would simplify our activities if we were able to adapt them for our use.

Beyond providing materials for compliance assistance, however, the SBA and its supporters are actually asking that OSHA certify that use of such materials constitutes compliance for covered employers. SBA terms this a "safe harbor" program, and has made much of the fact that OSHA will not tell an employer it is in compliance with the rule without conducting an inspection. What SBA fails to recognize is that this is true of any OSHA standard--the HCS is not unique in this respect. And it would not be possible to develop any materials that would completely satisfy the requirements of the rule in any workplace. The training and written program must be tailored to the workplace involved, and cannot be accomplished entirely with a generic program. If the blanks aren't filled in properly, compliance will not be achieved. If the training isn't conducted properly, the existence of a good written training program will not obviate the need for a citation for improper training.

As this is related to OMB's demand that we meet with SBA to develop a plan for compliance assistance, it is important that it be made clear at the outset that any attempt to develop such materials will not mean that small businesses will be able to ensure compliance by use of such materials. It should also be made clear that the intent of a performance standard is to allow appropriate materials to be tailored to the workplace involved, and any attempt to develop totally generic materials will result in a watered-down version of the program that will not be as appropriate to the workplace involved. As we have stated before, the efforts of trade associations to develop generic materials specific to their industries has been much more useful than completely generic, "applicable-to-anyone" programs.

SBA and its supporters also suggest that all consumer products be exempted, or in lieu of that suggestion, that they be exempted unless exposures are significantly greater than consumer exposures. As a precedent for this approach, they cite the household/consumer product exemption in SARA. This suggestion was adopted by OMB in its disapproval of the paperwork requirements for consumer products.

A complete **exemption** of consumer products is totally unacceptable in terms of providing protection for workers. Congress chose to include such an exemption in SARA, and EPA has interpreted it to apply to such products even when they are not going to be used in a household. This is contrary to the definition of consumer product under the Consumer Product Safety Commission's statutes and rules. A product is technically not a "consumer product" when it is being used in a workplace. For purposes of community right-to-know such an interpretation may be appropriate. It is, however, completely irrelevant to workplace situations where exposure is the key to determining whether appropriate protection has been provided in terms of right-to-know. Consistency with the EPA requirements for the sake of consistency, as suggested by OMB, is certainly not in the best interests of worker safety and health.

The original HCS did not include an exemption for consumer products, and in fact specifically rejected such an exemption out of concern for employees who were exposed to greater quantities than consumers. Products labeled in accordance with the Consumer Product Safety Commission's requirements did not have to have an additional label applied, but material safety data sheets were required and training on such products had to be completed.

A consumer label is designed by a manufacturer to protect someone using the product as intended, in the home, not using it on a regular basis in the workplace. In fact, there are a number of consumer product labels which include statements on them to the effect that the warranty will not apply if used in the workplace rather than in a household, or which suggest that the company be contacted for an MSDS if the product is used in the workplace. OSHA has no authority or control over the information included on a consumer product label--that is the purview of the CPSC. It is therefore even more important that an MSDS be available where appropriate so that employers and employees have adequate information about these products.

OSHA has had an enforcement policy for the original standard which stated that where employees are using the consumer products as intended by the manufacturer, with exposure comparable to the duration and frequency of exposure of a consumer, the rule would not apply. This has been a reasonable compromise between total coverage regardless of extent of use, and no coverage, which provides no protection for workers. Furthermore, we raised this issue for comments in the 1985 ANPR, and although some commenters supported exempting consumer products, there were a number of others who emphasized that exposures in the workplace were often greater than consumers and that such products have to be covered to adequately protect workers. Many companies already have policies to include consumer products in their programs regardless of the extent of use in order to have the most protective approach.

The coverage of consumer products becomes particularly critical on construction sites, and for other small employers who purchase items at retail stores. A local hardware store sells solvents that contain methylene chloride and trichloroethane; solder that is 60% lead and has a label which simply states that it is fatal if swallowed; and large containers of muriatic acid. Labels for these types of products tend to emphasize how to use the material, and not what the hazards are or how to protect a worker. Without a data sheet, the employer would not have enough information to ensure that employees are properly protected, and employees would not have the right-to-know that the HCS is supposed to provide them. There is apparently a misconception that consumer products are safer than industrial products--this is certainly not the case. And the protections required on labels for the household consumer are not designed to protect workers who, during their employment, use more of the product or use the product more frequently than ordinary household consumers. Furthermore, it can be anticipated that some products would be exempt if sold in a retail store, because they are "consumer products", but covered if sold from a wholesale distributor, because they are packaged for industrial use. This will probably result in some employers purchasing products retail to ensure they are not covered by the rule.

In no way can this suggestion be justified in terms of worker protection, and the rule must not be modified to address this issue. The provision in the current rule is already a compromise based on practicality, and in the Agency's experience it has worked well in the implementation of the original rule. The ultimate effect of this type of modification would be to effectively "gut" the rule's protections for many workers, particularly those in the construction industry.

The SBA has also recommended that the article definition, originally adopted in the 1983 rule, be modified, and OMB has adopted this recommendation as well. The record does not require re-opening the rule on this issue either. This was raised for comment in the ANPR, and the responses were mixed. A number were specific to castings, and reflected a lack of understanding of the rule in general. These misunderstandings have been clarified in subsequent letters. There were also a number of letters recommending a percentage cut-off approach to solid materials.

These were coordinated by The Formaldehyde Institute, and are primarily related to formaldehyde releases from such items as fabric and particleboard. We have specifically rejected this approach previously as it does not provide proper protection for workers. The percentage of a gas in a solid material is completely unrelated to the degree of material released. As formaldehyde is really the only example of this problem which has been raised, it appears that it should be dealt with specifically in the formaldehyde rule. That has apparently been done in the new formaldehyde standard by establishing a numerical cut-off for the release permitted.

Other comments received in response to the ANPR indicated that the article definition is appropriate as written, that it is logical and provides appropriate protection for workers. We did clarify interpretations of the definition in the preamble to the final rule, and that should suffice to address concerns regarding truly small releases. It should be noted that these have not been problems in enforcement--they are theoretical problems raised by various parties for purposes of discussion.

OMB is suggesting an even more comprehensive exemption to eliminate protection of workers involved in installing items that become exempted articles when installed, but which release hazardous chemicals during the installation (e.g., tiles containing lead which are applied to ship hulls). They based this determination on OSHA's decision not to require specific information for items when repair at some point in the future might result in exposure. This was an interpretation based on practicality concerns, not, as OMB indicated, an agreement that general information is more appropriate. We simply do not believe that it is possible to maintain MSDSs or labels for pieces of equipment or pipes to protect workers who might, for example, perform welding on them ten years from now. That does not mean that the worker installing these items day in and day out should not have specific information on the hazards encountered during such installation.

It has also been suggested that OSHA adopt all of EPA's article exemption found in the Toxic Substances Control Act (TSCA), rather than just the first two parts of it as was done. The application and scope of TSCA and the EPA article definition are unrelated to worker exposure and thus not appropriate for use in this rule. We have been as consistent as possible considering the differing purposes of the provisions. It should also be noted that under one section of SARA, EPA used its definition of article but has received comments to the effect that the OSHA definition should be used. They intend to modify their definition accordingly, but have also received objections from SBA concerning that approach.

In summary, the only viable suggestion from SBA concerns the development of materials for compliance assistance. And that suggestion is only viable in terms of providing assistance, not for certification of compliance prior to an inspection. The other suggestions would result in unacceptable decreases in employee protection and therefore would result in OSHA not protecting workers to the extent feasible.

Construction Industry Position

About 20 comments were received from the construction industry. Some of these were coordinated through SBA, others were coordinated through an organization called the National Construction Safety Executives Association, and the rest were independently submitted, although quite a few were from roofing companies and thus were probably solicited as well. In general, the construction industry representatives do not think construction needs to be covered (arguing that there are few chemical hazards, and that safety hazards are more important in terms of injuries to workers), although there is some recognition that coverage is necessary, particularly with regard to preemption of state requirements. Many of the comments made were questions about specific provisions, and indicate a need to provide educational materials to industry representatives. Interpretations of the rule with regard to specific construction issues and statements of policy regarding enforcement of the provisions may be necessary.

The SBA-coordinated comments supported the positions previously discussed above. In addition, some of those comments (particularly those of the National Association of Homebuilders (NAHB)) further addressed the multi-employer worksite provisions and claimed it is infeasible to implement them. There were unsubstantiated statements regarding the number of data sheets that would be present on the job sites (up to "thousands"--a claim that is inconsistent with other industry statements that there are few chemical hazards in construction, and thus construction need not be covered), and the suggestion that all work would have to shut down in order to exchange material safety data sheets. Obviously, OMB's action on the multi-employer worksite provisions was precipitated by these statements. However, it should be noted that even NAHB was more concerned with the exchange of data sheets than the presence of data sheets on the site. They recommended that each contractor keep copies of its own data sheets, and that employees be trained to go ask that contractor for an MSDS for any chemical about which the employee is interested in obtaining more information (rather than having the employee's employer be responsible for obtaining the information and being aware of the hazards and protective measures).

On the other hand, the National Construction Safety Executives' comments suggested that if a hazard communication standard had to be promulgated to apply to construction (and they don't believe there is a need), it should include a requirement for each contractor to post a list of chemicals at the job site with a copy of the applicable MSDSs. Each contractor would be responsible for posting only the MSDS for the substances they are using, but each employee would have available to them a list of all hazardous chemicals on the site. These comments do not seem to indicate that having copies of all material safety data sheets for the chemicals on the site is a problem. Furthermore, the Construction Advisory Committee recommended MSDS requirements for construction in 1980, endorsed the multi-employer worksite provisions when it reviewed the HCS, and in its most recent meeting (following receipt of the OMB letter), unanimously voted for a resolution that the standard should be implemented as written. This does not appear to indicate that the provisions are either infeasible or unnecessary.

We have discussed the multi-employer provisions with several State Plans that have expanded the scope of their rules, as well as construction contractors which have implemented the multiemployer type provisions in these State laws. The States' staffs generally believe that the rule will not be effective without the requirement for data sheets on the sites, and without a requirement for an exchange of information. The construction firms also stated that MSDSs are necessary to have an effective safety program on a job site, and while they agreed that collection and maintenance of the sheets is time-consuming, it is not infeasible or lacking in practical utility. The suggestion that there are thousands of chemicals on a large site was not confirmed by the firms we spoke to--one general contractor stated that on a typical site, half a file drawer would be enough space to maintain all of the written programs for the contractors on-site as well as all of their MSDSs.

OMB's suggestion that container labels and "generic training" are enough to provide information to construction employees is not supported by the record. We are certainly concerned that employers could not provide adequate "generic" training to their employees regarding the chemical hazards brought on site by another contractor when the employer doesn't get the appropriate material safety data sheets from the other contractor. In fact, given that there are already training requirements in construction, this decision in essence means that no additional protection has been provided for these employees through expansion of the rule.

The record does not warrant re-opening the rule to address issues raised by the construction industry. The multi-employer worksite provision is necessary to protect employees, and based on the Construction Advisory Committee's recommendations, recommendations of some of the commenters, the experience in State Plan States, and Agency experience in general, the provisions as written should be maintained. The Agency should develop some materials to help the construction industry comply, and ensure that they are interpreting the requirements of the rule appropriately.

Retail/Wholesale Trade

About a dozen comments were received concerning the application of the rule to the retail/wholesale trade. A number dealt with the difficulty in ensuring the transmittal of numerous data sheets for the products distributed. Others stated that the rule is not necessary in these types of industries, even in the limited fashion envisioned in the sealed container provisions. Many of these again reflect a lack of understanding concerning the actual requirements of the rule, and a need for further education of the industries involved and development of educational materials.

One suggestion made by the National Retail Merchants Association (NRMA) could be implemented through interpretations and appears to be a reasonable approach to determining which retail establishments must maintain MSDSs for products they sell to employers. It is simply an elaboration on the statement made by OSHA in the preamble of the expanded rule that retail distributors need to review their product line and their customers to determine if they sell hazardous chemicals to commercial accounts. The NRMA recommended that OSHA define a commercial account as an employer that purchases materials in bulk from a retail establishment and is given a discount on that basis. They said that this interpretation has been used in a number of States, and member companies in those States have been able to comply easily using this definition. Since this is what we meant, not intending to cover those situations where an employer incidentally purchases a consumer product in a retail establishment, implementing such an interpretation would be consistent with the rule and would apparently assist the retail merchants in determining what they have to do for compliance.

There were also several comments that dealt specifically with coverage of drugs. Drugs which are packaged for retail sale are already totally exempt from the rule, as are those which are solids in final form for administration to a patient. However, the drug industry maintains that there are still a significant number of drugs that would be covered, that the number of MSDSs would be overwhelming, and that there is little use for the information since pharmacists receive package inserts with information about the drugs, and have access to the Physicians' Desk Reference as well. OMB has obviously accepted these arguments in disapproving the paperwork requirements for any drugs regulated by the Food and Drug Administration.

Although the numbers presented by these commenters are greatly exaggerated, it is possible that an argument can be made that while data sheets do provide information a package insert wouldn't, the type of exposure involved is so minimal that the additional product specific information is not necessary. This does not mean that such products should be totally exempted from the rule (as suggested by OMB), but that OSHA could issue a policy statement or an interpretation of the rule to indicate that a package insert approved by FDA would be considered to be an MSDS under the standard. Rulemaking would thus not be required, employees would still have training and other information available to them, and the paperwork burden would be decreased. Further research regarding the contents and distribution of package inserts would be required before this could be implemented.

Resolution of Overlap with Other Federal Agencies

The broad scope of the HCS has created several situations where the jurisdiction of OSHA and other Federal agencies may overlap or conflict. Of particular concern are the requirements of the Department of Transportation (particularly with regard to truck drivers, terminals, and railroads), and those of EPA regarding exposure to pesticides. The 4(b)(1) preemption language in the OSH Act says that OSHA is preempted when the other Agency has exercised its statutory authority to protect workers. There are very serious questions in these areas as to whether these Agencies have in fact "exercised" their authority. We have had preliminary discussions with representatives of both, and expect to continue to do so. It appears that a memorandum of understanding may be necessary to ensure that all involved are aware of the agreements reached. There were a number of comments which dealt with these potential conflicts, and it would be helpful to the regulated community to resolve them as soon as possible while ensuring that someone is, in fact, protecting the workers involved.

Conclusion

As we stated at the outset of this memorandum, we do not believe that there is any evidence in the record that requires re-opening the rule. We do believe that the Agency must commit resources to developing compliance assistance materials, and doing some outreach programs to educate the regulated community. Furthermore, since the OMB letter was based on limited information that was actively solicited by SBA and OMB, and is a biased representation of the actual situation, it is incumbent upon the Agency to respond substantively to the issues raised based on the record developed during this extensive rulemaking process, Agency experience in enforcing the rule, and the experience of those States which have already expanded the standard.

In order to document the economic feasibility of extending the Hazard Communication rule to nonmanufacturing industries, OSHA invited additional comments and recommendations pertaining to feasibility to be submitted within 60 days of publication of this rule (beginning August 24, 1987).

Several comments have been submitted to the docket office. Many references are made to the economic impact and feasibility analysis completed by the Office of Regulatory Analysis (ORA). In general, three criticisms have been made: (a) the data used by ORA from the National Institute for Occupational Safety and Health (NIOSH) National Occupational Hazard Survey (NOHS) and the National Occupational Exposure Survey (NOES) to estimate the number of Material Safety Data Sheets (MSDS's) which a given establishment would be required to maintain are inappropriate and have resulted in low cost estimates for maintaining MSDS's; (b) the estimate of two hours of professional time required for providing a written program is too low; and (c) the cost estimates related to the Superfund Amendment and Reauthorization Act (SARA), Title III, Sections 311 and 312, are too low.

The Office of Regulatory Analysis used the same procedures for estimating costs associated with the Hazard Communication Standard for nonmanufacturing as it did for manufacturing. The wide public acceptance of this methodology for determining the potential costs of the Hazard Communication Standard to manufacturing was seen as a good reason for this. To estimate the average number of MSDS's that a typical establishment in the nonmanufacturing sector would have to maintain under the standard, ORA used a combination of the NIOSH NOES and NOHS data sets. Both the NOHS and NOES were designed to estimate the number and types of chemicals to which private sector employees in all occupations are routinely exposed. OSHA used the NOHS/NOES survey data to indicate the broad scope of chemical exposures in general, including the number of chemical products and the associated numbers of exposures involved.

In the 1983 Standard, OSHA relied on exposure data from the NIOSH National Occupational Hazard Survey conducted between 1972 and 1974. The major disagreement manufacturing industries had with the use of these data was that it had been collected ten years prior to its use in the analysis, and that many things in industry had changed. To address this concern, ORA utilized unpublished data from the National Occupational Exposure Survey, conducted between 1981 and 1983, in its regulatory impact analysis for nonmanufacturing. The NOES data used by ORA is a count of actual products containing hazardous chemicals to which a worker is potentially exposed and is therefore representative of the number of MSDS's an employer will be required to maintain under the Hazard Communication Standard. This survey data is compatible with the NOHS data, and only where NOES data were not available did ORA use earlier NOHS observations. The NOES involved walk-through investigations in 4,490 facilities in 523 different industries in which 1,800,000 workers were employed in 410 occupations.

Another concern expressed by the manufacturing industries about the NOHS data was that it overcounted the number of potential hazards. On May 18, 1982, the Chemical Manufacturer's Association (CMA) submitted a document to the docket (H-022) which discussed the NOHS data base. The CMA's fear was that OSHA's reliance on the NOHS data may "overstate the existing hazards presented by chemicals in the workplace," and that the results of an exhaustive review of the NOHS report by the Franklin Research Center concluded that "occupational exposure to potential carcinogens has been greatly overestimated," (page 6). However, NIOSH testified regarding the validity of using the NOHS data for this purpose. (48 FR 53282).

The data used by ORA from the NOES are averages. OSHA expects that some establishments in the nonmanufacturing industries maintain more than the average, just as some establishments maintain less. Evidence submitted by the Small Business Administration, as well as other entities, in support of their view that ORA has underestimated the number of MSDS's generated by the standard by relying on the NIOSH data, upon close examination, overstates the number of MSDS's expected for compliance because (1) many of the itemized products are "articles" exempt from the standard (the lists include items which one would not expect to be cut (thereby creating hazardous dust) or soldered (thereby creating hazardous fumes)), and (2) many products are double counted because the same product is produced by several different manufacturers. One reason that the Hazard Communication Standard will reduce employee exposure to hazardous chemicals is that employers will take inventory of their potentially hazardous substances. After gaining an awareness of which products constitute hazards, employers are likely to substitute away from those products to products which pose less of a hazard, dispose of products which are never used, and maintain smaller quantities of those products which are used less frequently.

A second concern evident in the materials submitted to the docket is that OSHA is applying "the present manufacturing oriented Standard to all of the nation's non-manufacturing workplaces" (page 13, Statement of Charles Cadwell, Deputy Chief Counsel, Office of Chief Council for Advocacy, United States Small Business Administration, Before the Office of Management and Budget, On the Paperwork Burdens Associated With Expansion of the OSHA Hazard Communication Standard, October 16, 1987, hereafter referred to as Cadwell). In considering a standard for nonmanufacturing OSHA carefully considered the differences between manufacturing and nonmanufacturing. There are fewer hazardous chemicals and chemical hazards in nonmanufacturing (this was acknowledged by the Court, see 52 FR 31853), and OSHA took this into account in estimating the average eight hours of professional time required annually to develop and administer a training program (as opposed to the average 16 hours estimated for a typical firm in manufacturing). Also, the average two hours allowed to develop a written plan were seen as reasonable for a typical firm in nonmanufacturing, especially in view of the availability of publicly and privately developed outlines of written programs. Initially, ORA had estimated 8 hours for developing a written plan. This estimate was thought to be too high because it did not allow for economies of scale likely to arise from trade group and private service provider involvement. Two hours was subsequently adopted as a best estimate of the average time needed. ORA did not count time for rule familiarization because it is viewed as a citizen's responsibility to know the law (see Cadwell, page [illegible]). The time for making a list of the MSDS's was allotted in the maintenance provision of the standard (see Cadwell, page 6) and is estimated on a per MSDS basis. Time allotted for training employees about chemical hazards in their workplace was directly determined by the average number of chemicals held by a typcial establishment. An establishment with more products containing hazardous chemicals was therefore estimated to have more chemical hazards, and since training is based on chemical hazards, the estimated time required for training was higher than for establishments with fewer chemicals and chemical hazards (see JACA Report, page 4-19).

It was assumed by ORA that trade associations and private industry would provide pre-packaged guidelines for complying with the Hazard Communication Standard for a minimal fee. This assumption is supported in fact by materials submitted to this docket for public view (e.g., a Right to Know package is available from a private firm for $12.00, as well as a Hazard Communication Standard compliance package put out by the Graphic Arts Trade Association for its members). It is a possibility that, given the inexpensive guidelines available to industries in the nonmanufacturing sector, the ORA overestimated the average costs of compliance based on this alone. This directly contradicts claims that OSHA substantially underestimated costs.

A third concern expressed by industry was ORA's cost estimate of Title III of SARA, sections 311 and 312. Several comparisons have been made between OSHA's analysis and an alternative analysis prepared by EPA. EPA retained several of the assumptions they made when estimating the costs of Title III to the manufacturing sector. Many of these assumptions were deemed inappropriate for firms in the nonmanufacturing sector by ORA. For example, EPA calculated that over five hours of technical time, over five hours of managerial time, and forty minutes of secretarial time would be needed to set up a filing and record keeping system for Tier I forms once they are filled out. ORA believes this estimate grossly exaggerates the time it will take a clerical employee to establish a filing and recordkeeping system. In addition, EPA calculated time to become familiar with the rule, whereas OSHA, as a matter of policy, does not allow for this because of the obligation of a citizen to be familiar with the law. EPA based its estimate of the number of affected establishments for given thresholds on an average of manufacturing data from New Jersey and Michigan, and nonmanufacturing data from Michigan, and made no allowance for the fact that establishments in different SIC's and of different sizes will be affected by a threshold, differently. ORA based its estimates on consideration of how various Standard Industrial Codes (SIC's) would be affected, as well as how different sizes of establishments will be affected, instead of taking a straight percentage based on two unrepresentative data sources.

The documentation submitted to the OSHA docket office within the past 60 days provides insufficient evidence to persuade OSHA that the Hazard Communication Standard is infeasible in any industry. Although there are claims from the construction industry that costs are severely underestimated by OSHA and it is therefore infeasible for this industry to comply, the construction industry has been subject to state hazard communication laws for years in state plan states. Also, it is subject to 29 CFR 1926.21, which previously established the obligation to train construction workers in the handling of hazardous substances. In this regard the Hazard Communication Standard has added little additional duty. OSHA's cost estimates focus only on new duties, not on the burdens of pre-existing standards. Consequently, OSHA finds that the cost claims are unsubstantiated by any analysis or evidence, and that nothing in the record supports a conclusion of infeasibility in any SIC.

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

December 10, 1987

MEMORANDUM FOR THE POLICY REVIEW BOARD

FROM: John A. Pendergrass

SUBJECT: Hazard Communication Issues

1) Should OHSA engage in additional rulemaking in response to comments and to the October 28, 1987 OMB letter?

o [redacted] (See Attachment 1)

o [redacted] (See Attachment 1)

o In the face of OMB's disapproval of certain "collection of information requirements" of the HCS under the Paperwork Reduction Act, OSHA apparently must undertake a rulemaking to address those issues if the agency wants to implement the disapproved provisions. There is nothing in the record that would preclude OSHA from reopening the HCS record to seek additional comments.

o OSHA would propose to undertake additional rulemaking to address those issues raised by the OMB letter. OSHA may raise one or two additional issues. In the rulemaking document, OSHA would not adopt the OMB positions as the agency's proposal, but would present both the current provisions and the OMB positions, with a discussion of the record, for public comment.

2) What should the timetable be for completing the rulemaking process?

   - OSHA would transmit a proposed rule to OMB for review in early February and complete the rulemaking by September. (See Attachment 2)

   - OMB appears willing to permit those paperwork -related provisions of the HCS that are not in dispute to become effective on May 23, 1988, if the agency engages in a timely rulemaking process. They would probably modify the timetable set forth in their October 28 letter to reflect this decision at the time we published our proposed rule.

3) Should OSHA stay the effective date of the disputed provisions of the HCS if the rulemaking runs beyond May 23, 1987?

   - There would have to be some official notice to the public prior to May 23 of OSHA's intentions with regard to implementing the disputed provisions while a rulemaking was still in progress.

   - A proceeding to stay the provisions would probably send the clearest message with regard to OSHA's plans but would make OSHA the clear target of further legal challenge in the Third Circuit.

   - A viable alternative that would make OMB a more likely target of litigation than OSHA would be to announce the unenforceability of the disputed provisions under the Paperwork Reduction Act. OMB would favor this approach.

4) Should OSHA draft a reply to the OMB letter at least stating how we intend to proceed?

   - Same sort of response would probably be appropriate. OMB would like us to publish such a response in the Federal Register.

   - It does not seem appropriate to try to respond to the merits of the issues raised.

Mr. PENDERGRASS. That's right.

The CHAIRMAN. So your Director of Health Standards was recommending that OSHA should not cave in to OMB's heavy-handed threat by reopening the standard; isn't that right? That, in effect, is what it says. Maybe you can put a different spin on it.

Mr. PENDERGRASS. The Director of Health Standards strongly supported what the standard is, yes.

Mr. WHITE. He said there was no additional data to support a change, and we agreed to that.

The CHAIRMAN. Did you support the recommendation not to reopen the rulemaking at a Policy Review Board meeting on November 25, 1987?

Mr. PENDERGRASS. I think that that is right.

[The minutes of November 25, 1987 follow:]

MINUTES

POLICY REVIEW BOARD

November 25, 1987

ATTENDEES: Ms. Attwood, Ms. Eckhart, Ms. Morris, Ms. Silvey and Messrs. Baroody, Demarest, Maroni, Pendergrass, Adkins, Chalmers, Copeland, Droitsch, Feldman, Johnson, Thorn, White, and Wood

AGENDA ITEM: Future Steps on the OSHA Hazard Communication Standard (HCS)

Mr. Baroody opened the meeting and summarized the actions taken to date. He noted that chances for full public participation in the rulemaking had to be curtailed and that the May 1988 deadline for the effective date of the standard was approaching rapidly. He then invited Mr. Pendergrass to discuss his findings and recommendations for future action.

After this, there was a full discussion of such issues as the substance of the materials in the public record, the OMB letter on paperwork and other aspects, the possible legal and legislative implications, and the timing and workload of the alternatives.

Based on this discussion, the decisions of the PRB were:

1. OSHA is to proceed immediately on two tracks.
   a. It will open negotiations with OMB on the issues raised in the OMB letter and will explain the clarifications in the HCS it hopes to make.
   b. Assuming some reopening of the rule will be needed, OSHA will begin listing the issues that will have to be addressed and developing the supporting rationale.
2. OSHA will report back to the PRB on December 10 on its progress on both tracks with a better estimate of what can be done when.
3. OSHA will work with SOL and OASAM to publish the OMB letter in the Federal Register as soon as possible.
4. OSHA will work with SBA to help develop more guidance (short of specifications) to help small businesses comply.

Mr. WHITE. Yes, I recall that meeting, and yes, we did suggest that changes were not necessary.

The CHAIRMAN. And I understand the Policy Review Board gave you ten days to convince OMB not to reopen the standard. I would be interested in whether you tried and whether you succeeded.

Mr. WHITE. Well, I guess I was delegated to try, and I did try, and I tried to persuade OMB that perhaps we could come to some accommodation short of rulemaking through, perhaps, some interpretations which didn't offend our basic position but that accommodated their concerns; and frankly, I didn't get very far.

Mr. BAROODY. And speaking for the Board, we saw a situation in which OSHA was not saying that no change could be made; they clearly did not think change had to be made, but they were saying that it could be made administratively, and they were to make that case to OMB.

The CHAIRMAN. And so the standard has been reopened?

Mr. PENDERGRASS. The standard, certain aspects of it——

The CHAIRMAN. Rulemaking, the rulemaking has been reopened.

Mr. BAROODY. The proposal to do that is pending, but has not yet been published.

The CHAIRMAN. But it is going to be published, is that not correct?

Mr. BAROODY. Yes.

Mr. PENDERGRASS. Yes.

The CHAIRMAN. Well, let the record show that yes, it is going to be.

Ms. Silk testified that OMB's use of the Paperwork Reduction Act in this case has already had a chilling effect on OSHA standard-setting, because OSHA's health scientists now take that into consideration when they draft standards.

Don't you think that OSHA needed a set of strong precedents against this kind of action by standing firm and not caving in to OMB's heavy-handed threat?

Mr. PENDERGRASS. I think that we have held firm. I am convinced——

The CHAIRMAN. In what respect?

Mr. PENDERGRASS. Mr. Chairman, both the Director of Health Standards and the Director of Safety Standards have assured me repeatedly that, in accordance with my desires, they have not accepted changes to standards that substantively affect the protection of workers. And I——

The CHAIRMAN. But you caved in to the threat, Mr. Pendergrass. You caved in to the threat by OMB, just as clear and plain as we are in this room. You caved in.

Mr. WHITE. That is not true at all, Senator. In fact, our current proposal makes virtually no change in the standard, and that is what we are proposing, to essentially retain the standard as written, and that is the proposal that is pending in OMB. I am sure you have a copy of it.

The CHAIRMAN. Well, you recommend, as you just testified, that they not reopen; you tried to persuade them, and it is going to be reopened. Now, that is caving in, in my book. I don't know what anybody else says; some people may say, well, that's an accommodation.

Mr. BAROODY. Senator, there was, and I represented it, a school of thought at the Department that thought it was a good idea to reopen. But the threat that you speak of was not idle in this case. It was at least the view then—I think it is still now—of the lawyers at the Department that the Paperwork Reduction Act gave them the statutory authority to act.

The CHAIRMAN. At your confirmation hearing, Mr. Pendergrass—this is something I have seen as a Member of this Committee over a long period of time with OMB in these areas. And just because of that—just because of that type of intervention—I asked you at your confirmation: "If you are confirmed as an OSHA Administrator, are you going to make the decisions affecting the health and safety of workers, or are you going to let OMB make them?" Mr. Pendergrass?

Mr. PENDERGRASS. My answer was I will make them.

The CHAIRMAN. "As Assistant Secretary of Labor, that is my responsibility, and I will make those."

Well, you didn't in this case.

Mr. PENDERGRASS. I disagree.

The CHAIRMAN. Or if you did object to it——

Mr. PENDERGRASS. I disagree.

The CHAIRMAN. You didn't raise much trouble in it. You didn't come back up here and say: "Senator Kennedy, of the Labor Committee, this is what is happening, this is what is happening. I gave you those assurances and here is one instance where I cannot do that," and indicate at least some kind of reservation or opposition or indignation.

Mr. PENDERGRASS. Mr. Chairman, I disagree. I think I have done that. I think I did it in this case. There is a question of what law is being complied with. Our understanding, my advice was that OMB administers the Paperwork Reduction Act, and this action was under that Act. I didn't feel that I needed help on that.

The CHAIRMAN. I have a series of other similar kinds of walkthroughs, really taking off on what happened, starting with the principal victims that we had, and also relating back to some of the scientists' testimony.

GAO will be coming subsequently, and we will put their statement in the record, and if Members have particular questions, they will be able to submit them to the GAO.

[The prepared statement of Mr. Gainer follows:]

United States General Accounting Office

GAO

Testimony

For Release
on Delivery
Expected at
9:30 a.m. EST
Wednesday
April 20, 1988

OSHA's Monitoring and Evaluation of State Programs

Statement of
William J. Gainer, Associate Director
Human Resources Division

Before the
Committee on Labor and Human Resources
United States Senate

SUMMARY OF GAO TESTIMONY BY WILLIAM J. GAINER ON OSHA'S MONITORING AND EVALUATION OF STATE PROGRAMS

Federal legislation encourages states to develop and operate occupational safety and health programs, which 25 states and territories currently do. Legislation also requires the Occupational Safety and Health Administration (OSHA) to evaluate these state programs to assure that they are at least as effective as OSHA-administered programs in providing safe and healthful workplaces.

MONITORING AND EVALUATION OF STATE PROGRAMS. OSHA uses an elaborate information reporting system to track state program activities in hundreds of categories, compares state to federal activities, and follows up on significant differences. It also prepares an annual evaluation report on each state. However, its approach to monitoring and evaluation still has what GAO considers to be significant shortcomings. No desired performance levels or incentives for attaining them are established for states, and information is lacking on how states assure program quality and on programs' impact on worker safety and health. GAO recommends that OSHA (1) establish desired performance levels for use by state programs and consider providing incentives for states to attain desired performance levels, (2) require that states establish quality assurance programs and then periodically review those efforts, and (3) work with the states to help them evaluate their programs' impact on worker safety and health.

CALIFORNIA STATE PROGRAM. OSHA now operates the private sector safety and health program in California, pending a final State Supreme Court decision on the legality of the state's withdrawal from private sector enforcement. As a result, worker protection coverage for about 9.5 million workers in the state may have declined for three reasons. First, occupational safety and health standards and exposure limits under California rules are more comprehensive, are broader in scope, and cover more potential worksite hazards than under OSHA. Second, state legislation is more stringent, with tougher sanctions for employers that violate the law. Third, the number of safety and health inspections in California has decreased under OSHA and is expected to remain at about a third of the previous level through at least fiscal year 1988.

Assuming enforcement responsibility in California has also disrupted OSHA's program efforts nationwide. OSHA estimates that by June 1988 about a third of its 1,100 inspectors and supervisory staff will have spent some time in California on temporary tours of duty. To maintain the level of inspections nationwide in their absence, OSHA has curtailed other activities such as state monitoring and internal audits.

Mr. Chairman and Members of the Committee:

On June 8, 1987, you requested that GAO (1) review and suggest improvements to OSHA's monitoring and evaluation of state-operated safety and health programs and (2) determine the status and consequences of OSHA's resumption of private sector enforcement in California. We are pleased to be here today to discuss the results of our review.

To assess OSHA's monitoring and evaluation of state programs we (1) determined, through discussions with agency officials, OSHA's major monitoring and evaluation activities and analyzed documents related to those activities, (2) talked with officials in 12 state-operated programs about quality assurance mechanisms, evaluation of the state programs' impact on worker safety and health, and alternative ways OSHA could use the program activity data it collects, and (3) visited two states (Maryland and Virginia) and reviewed documents such as their program operating plans and the two primary OSHA monitoring and evaluation reports for these states--the state program activity measures reports from OSHA's computerized management information system and the annual evaluation reports.

As agreed, we did not develop information on the effect or impact of any specific weaknesses in OSHA's monitoring and evaluation approach because Labor's Inspector General's Office was conducting an evaluation designed to obtain this kind of information in six states. Labor expects to report its findings later this year.

Concerning California's program, we tracked developments in California, reviewed OSHA's plan for resuming enforcement activities, obtained data on staffing and funding levels, and analyzed differences in the structure of the federal and California programs. However, we did not assess California's implementation of its worker protection activities prior to OSHA's assuming responsibility for the private sector program. We also met with program officials in OSHA's Region IX in San Francisco and in California's occupational safety and health program, with state legislative staff, and with representatives of groups opposing withdrawal of the state program.

OSHA is required by law to assure that state programs are as effective as its own in providing a safe and healthful workplace. Although it has an elaborate information reporting system that tracks program activities in hundreds of categories, the agency

-- does not set desired performance levels to which states can manage;

- -- lacks information for monitoring how states assure the quality of inspections and other program activities; and
- -- lacks information regarding the impact of state programs on worker safety and health.

Consequently, we recommend that OSHA

- -- establish desired performance levels for use by state programs and consider providing incentives for states to attain them;
- -- require that states establish quality assurance programs and then periodically review these efforts; and
- -- work with the states to help them evaluate their programs' impact on worker safety and health.

Regarding OSHA's resumption of worker protection activities in California, OSHA

- -- is now operating the private sector safety and health program, pending a final State Supreme Court decision on the legality of California's withdrawal from private sector enforcement, but
- -- may be providing less enforcement coverage because (1) standards and substance exposure limits are less comprehensive under federal regulations than under California rules, (2) federal legislation is less stringent than that of California, and (3) the number of inspections has decreased, and
- -- is experiencing a disruption of federal enforcement capability nationwide because of the diversion of staff to California from other parts of the country.

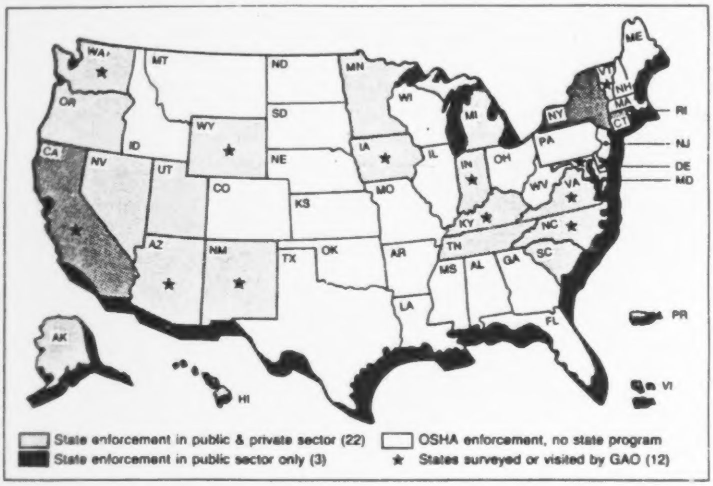
I will elaborate on each of these points after briefly describing the legislative provisions governing state occupational safety and health programs and identifying the states that operate them.

LEGISLATION PROVIDES FOR STATE PROGRAMS

To meet OSHA's mandate to assure every U.S. worker safe and healthful working conditions, the Occupational Safety and Health Act of 1970 encourages the states to develop and operate their own safety and health programs. To assume the responsibility for developing and enforcing its own program, a state must submit a detailed plan for OSHA approval. OSHA then may fund up to 50 percent of the cost of operating these programs.

GAO

OSHA Monitoring & Evaluation of State Programs: Locations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MO
KY
NC
TN
AZ
NM
OK
AR
SC
TX
MS
AL
GA
LA
FL
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AK
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VI
▨ State enforcement in public & private sector (22)
■ State enforcement in public sector only (3)
☐ OSHA enforcement, no state program
★ States surveyed or visited by GAO (12)

As the chart above shows, 25 states and territories operate safety and health programs. Three of these states provide enforcement only in the public sector (state and local government employees) while the remaining 22 cover both the public and private sectors. With one exception, these state enforcement activities began before 1980. The chart also shows the 12 states where we visited and/or surveyed program officials by telephone (Arizona, California, Indiana, Iowa, Kentucky, Maryland, New Mexico, North Carolina, Vermont, Virginia, Washington, and Wyoming).

In fiscal year 1987, state programs had approximately 1,075 safety and health inspectors performing approximately 110,000 inspections compared to approximately 1,050 OSHA inspectors performing approximately 61,500 inspections. In fiscal year 1987, OSHA provided the 25 state programs $51.5 million. (OSHA's total FY 1987 budget was about $229 million.)

The act requires OSHA to make continuing evaluations of state safety and health programs on the basis of reports submitted by the states and its oversight inspections. OSHA may withdraw a state's authority to operate a program for failure to comply with the plan OSHA approved, but OSHA has never done so.

MONITORING AND EVALUATION OF STATE PROGRAMS

OSHA's monitoring and evaluation of state programs has two major features. The first is the collection and comparative analysis of data in computerized state program activity measures reports. Analysis involves item-by-item comparisons of state and federal program activities, supplemented by follow-up inquiries where significant differences are noted. The second is an annual evaluation report for each state that draws on that analysis and other information to conclude whether the state is "at least as effective" as the federal program, as required by legislation.

This general approach, initiated in 1983, was developed by federal and state work groups to replace one that relied primarily upon very labor-intensive, on-site monitoring by OSHA personnel. OSHA considered that monitoring approach no longer necessary given the states' experience operating safety and health programs. GAO last reported on OSHA's monitoring of state programs in 1982 (Improvements Needed in Monitoring State Plans for Occupational Safety and Health, HRD-82-29). We made no recommendations at that time because OSHA was developing a new monitoring system, which we believed would adequately respond to two GAO concerns that OSHA (1) did not efficiently use its monitoring resources and (2) had not established acceptable levels of performance for state-operated programs.

OSHA's current approach, using state-reported data, avoids the inefficiencies we described earlier, and the collection and analysis of state and federal information was expected to respond to our concern that performance standards had not been developed. As it has developed, however, OSHA's monitoring and evaluation approach for state programs still has what we consider to be significant shortcomings. It still lacks performance standards, provides no incentives for attaining those standards, requires no quality assurance mechanisms, and collects little information regarding state programs' impact on worker safety and health.

Monitoring Activities

OSHA's monitoring of state programs relies heavily on the state program activity measures reports. They include over 300 specific performance measures in 19 major categories such as standards development, public and private sector inspections, and penalty assessment and collections. Some examples are (1) the percentage of standards adopted by the state within six months of federal promulgation, (2) the percentage of public sector safety inspections in which some noncompliance with safety and health standards was found, and (3) the average initial dollar penalty for serious violations.

OSHA uses these statistics to assess the quality of state programs through following up on potential problem areas. Although many of the measures are used for descriptive purposes only, each quarter OSHA compares state performance to that of OSHA on about 65 of these measures. Where differences exceed specified limits, OSHA may perform special inquiries if the reasons for the differences cannot be readily determined. Such inquiries include on-site monitoring such as formal interviews, reviews of other data, and visits made with state inspectors. These inquiries are made at OSHA's discretion within the limits of available resources. For example, during 1986, OSHA's Philadelphia Region performed inquiries into Maryland's program, to determine whether

-- the most hazardous worksites were inspected first,

-- the state was determining properly which complaints required inspections and which required only a letter response, and

-- why such a low percentage of the violations cited were classified as serious rather than nonserious.

Annual Evaluation Report

OSHA prepares an annual evaluation report for each state in which it determines whether the legislation's requirement that a state program be as effective as OSHA's has been met. It defines "effective" principally in terms of the state's activity level relative to OSHA's performance rather than in terms of the program's impact on worker safety and health. The evaluation also considers any follow-up inquiries, reviews of complaints about the state program, and other events reported by the state that might impact negatively on state performance (such as a state court ruling that limits state inspectors' ability to make their visits unannounced, which is a federal legislative requirement).

Overview of Problems and Needed Improvements

The following chart summarizes significant shortcomings we identified in OSHA's monitoring and evaluation of state programs and our recommendations for improvement.

GAO OSHA Monitoring & Evaluation of State Programs: Overview

Problem	Needed Improvements
No desired performance levels established	• Set desired performance levels for state programs and consider providing incentives for attaining them
Information lacking on how states assure program quality	• Require and review state quality assurance programs
Impact of state programs on safety and health unknown	• Work with states to evaluate impact on safety and health

Desired Performance Levels For State Programs Need To Be Established

A sound performance management system should identify key performance measures, establish desired performance levels, track performance, and apply sanctions to poor performance or reward good program performance. The current approach, however, does not identify key measures and goals, or desired performance levels, for them. Instead, it treats all measures reported as if they were equally important. In addition, since state performance for a period is compared to federal performance for the same period, the states, in essence, are aiming at a "moving target." Even though OSHA expects state and federal performance to be similar, there is no way for a state to know in advance what the federal performance will be and, thus, try to match it. Because federal performance fluctuates from one quarter to another, the same state performance could match that of OSHA in one quarter but be better or worse in the next. For example, 13 of 40 OSHA enforcement program measures changed by 20 percent or more from 1985 to 1986. (Nine increased; four decreased.)

Officials in all but one of the states we surveyed agreed that key measures should be identified. Some suggested that a joint federal-state work group such as those used in the past by OSHA could identify key measures and develop procedures through which OSHA could set desired performance levels.

The performance management system could be further enhanced if the desired performance levels were used as a means of encouraging program improvements by rewarding or penalizing states' performance. Instead, OSHA's current approach provides no rewards or sanctions for program performance with the exception of withdrawal of state plan approval. If OSHA were to withdraw plan approval--which has never happened--enforcement responsibilities, and the entire cost of operating the program, would return to the federal government. That could mean a significant increase in federal costs, since OSHA's share is no more than 50 percent when states operate the program. Having only this extreme alternative is a disincentive for OSHA to scrutinize state performance and makes it unlikely that states will be penalized for poor performance. Nor is there any way to reward states for attaining or exceeding desired performance levels even if those goals were established.

Officials we interviewed in six of the 12 states believed there should be financial incentives for good state programs. Concerns raised by the other six, and in some cases by those who, overall, supported the approach, were as follows:

-- State programs should not get extra funds for just doing the good job they're supposed to do.

-- OSHA would need better procedures to assure the accuracy of state data if additional funds were involved.

-- Federal funds should first be provided equitably to states. These officials believe funds now provided are more adequate for some states than for others, which would allow some states to demonstrate superior performance only because they are better funded.

(As of fiscal year 1989, instead of continuing to distribute any funding increases equally among the states, OSHA will use a new funding method that will allocate some of the funds to states on the basis of the proportion of employees in hazardous industries. However, we did not assess whether, or how quickly, that funding method will bring states to parity with respect to the enforcement task facing them.)

We recognize that establishing desired performance levels and developing an approach for rewarding desired performance may be difficult. Nevertheless, we recommend that OSHA (1) establish desired performance levels on key measures and (2) consider providing financial (or other) incentives for states to attain them.

OSHA Needs Systematic Information On State Program Quality

As I noted earlier, OSHA relies primarily on its computerized management information system to assess state program quality; that is, if states compare favorably to federal program activity, it assumes that states are operating quality programs. If not, OSHA may perform further analysis of the state's operating procedures and management controls to determine the cause of the difference in activity measures. However, OSHA's monitoring approach, including the data in the management information system, does not provide for collection and analysis of information on management control mechanisms that relate directly to the quality of the states' program functions.

In contrast to the way it assesses quality in state programs, to assess the quality of its own inspections and other program activities, OSHA relies on an internal audit program and employee/employer surveys in addition to data from its management information system. Labor's Inspector General has recently identified weaknesses in the audit procedures now used, in that they focus too much on detail rather than on systemic weaknesses. Nonetheless, they do represent an expansion over OSHA's state program monitoring approach. In further contrast to state programs, OSHA area offices are required to have management control systems that are intended to assure the quality of inspections and other enforcement functions such as assuring prompt abatement of hazards and appropriately processing complaints and referrals. In response to the Inspector General's report, OSHA has draft audit guidelines that would revise its current procedures to require regional offices to verify that the management control systems exist, determine if they are capable of serving the intended purpose, and review the data provided by the systems.

We recommend that OSHA use a similar approach in monitoring state programs. OSHA should require states to establish quality assurance mechanisms, if they do not have them, and should periodically track and review these quality assurance efforts. For example, such mechanisms might include the following:

-- a management control system to track enforcement functions as required for OSHA's area offices;

-- supervisory reviews of compliance officer activities;

- -- procedures to solicit feedback from employers and other affected groups such as unions on inspection quality; and
- -- procedures for verifying state activity data reported to OSHA's management information system.

According to the state officials we interviewed, their states have in place some or all of these quality assurance mechanisms; however, information resulting from the application of these mechanisms is generally not reported to or reviewed by OSHA. For example, in Maryland and Virginia, supervisors reinspect a sample of worksites for each inspector to evaluate the quality of the initial inspection. The results of these supervisory visits could be summarized and reported to OSHA.

OSHA Needs To Know The Impact Of State Programs On Worker Safety And Health

OSHA's legislation does not specifically define "effectiveness," but it does require that the states' standards and their enforcement should be at least as effective as those of the federal government "in providing safe and healthful employment and places of employment." OSHA, however, defines the effectiveness of state programs in terms of program activities, giving little attention to determining what characteristics of state programs have contributed to the reduction (or lack of reduction) in workplace injuries and illnesses so that program improvements could be made. For example, statewide injury and illness data compiled by the Bureau of Labor Statistics are included among the state-federal comparisons, but OSHA officials informed us that those comparisons are not used to draw any conclusion about impact.

We believe determining effectiveness should include assessing programs' impact on worker safety and health as well as reviewing the nature of the program activities themselves. As GAO pointed out in a previous report (Strong Leadership Needed to Improve Management at the Department of Labor, GAO/HRD-86-12), program evaluation is a critical management tool. Information on the impact of policies and program activities should be used as feedback to enable managers to (1) make more informed decisions, (2) facilitate better planning, and (3) identify program activities that need to be improved to increase program effectiveness.

OSHA or the states could design studies that would address the impact of state programs and at the same time provide information about which program activities are having the desired effect and which ones should be revised. For those purposes, the statewide data now reported to OSHA have limited utility. For example, the 1986 evaluation of Maryland's program compared state changes to national changes from 1984 to 1985 in selected occupational injury and illness incidence statistics across all industries and in selected industries. Although such statewide comparisons may have some value, the differences reflect not only the effect of the worker protection program, but also factors such as the health of the economy. Consequently, to use those comparisons to draw inferences about the effect of the worker protection program, a whole range of other variables would need to be included in the analysis, and the quality and availability of data might be a problem in attempting to perform such analyses.

Analyses using aggregate data such as those for the entire state or all establishments in certain industries, even if performed adequately, still would not yield information about which program features were working well and which need to be improved. An alternative approach which has been used to provide that kind of information involves establishment-level rather than aggregate data--looking for a difference between establishments or at different times in the same establishment where information is available about what worker protection activities were actually provided.

We recommend that OSHA work with the states to help them develop and implement plans for evaluating the impact of their programs. OSHA's role would be that of encouraging states to conduct these evaluations, providing technical guidance and assistance, and reviewing the studies' findings. OSHA's guidance to the states would be especially helpful if it identified a variety of evaluation methodologies and the associated resources needed to implement each of them.

About three-fourths of the state officials we interviewed either described current efforts in their state to determine the impact of their worker protection program or said it would be feasible to develop an evaluation plan. Some had reservations because they thought they would need either assistance from OSHA on how to design and carry out the evaluations or additional resources to purchase such assistance.

STATUS AND CONSEQUENCES OF CALIFORNIA'S REDUCED ROLE IN WORKER PROTECTION

Your second question concerned the current protection provided workers in the state of California, given the state's proposed withdrawal from private sector enforcement. I will first describe the status of enforcement activities in that state and then discuss some consequences.

Private Sector Enforcement By OSHA

With the exception of a transitional period shortly after OSHA was created, the California program provided enforcement in the private sector from its beginning in 1913 until July 1, 1987. At that time, OSHA assumed the responsibility for protection of the 9.5 million workers in the private sector (approximately one-tenth of the U.S. work force), even though California retained enforcement responsibility in the public sector. In accordance with a rider to the Labor Department's fiscal year 1988 appropriation, OSHA has not terminated California's state plan agreement. Instead, OSHA is providing enforcement coverage until a decision has been reached by the California State Supreme Court on the legality of the state's termination of private sector enforcement. This does not, however, prevent OSHA from hiring staff and opening offices in California.

The actions leading to the current situation were as follows. On January 8, 1987, the Governor announced that his budget for the year beginning July 1, 1987, did not include funds for private sector enforcement in the state's occupational safety and health program, called "CAL/OSHA." According to the Governor, California taxpayers should not fund programs where alternatives exist to provide comparable levels of services. (By withdrawing, California would spend about $16 million less.)

The Governor notified the Department of Labor on February 6, 1987, of his intention to terminate the state's private sector worker protection program on June 30, 1987. In his notification, the Governor requested continued California responsibility for enforcement in the public sector and for the "consultation program" for the public and private sectors, which helps employers improve their safety and health programs without penalty.

The Governor's letter triggered lobbying in the state capital by representatives of labor unions and business groups to maintain the program and ultimately prompted litigation to prevent his actions. Committee hearings were held in the State Assembly and Senate with witnesses praising the state's performance over the years, especially its development of comprehensive safety standards. Subsequently, the state legislature reinstated funds to continue the program, but the Governor refused to spend these funds.

Two groups (California Rural Legal Assistance and the California State Employees' Association) filed separate suits in the state's Third District Court of Appeals, challenging on different grounds the Governor's authority to end the program. In October 1987, the Appellate Court issued a decision that the Governor lacked legal authority to withdraw the private sector program by refusing to spend funds designated for the program. That decision was appealed to the California State Supreme Court, which has agreed to hear the case. Officials in California believe that the court's decision may come in September or October 1988.

The situation in California has had two major consequences:

-- enforcement coverage for workers in California may have declined and

-- OSHA's enforcement efforts nationwide have been disrupted.

Changes In Enforcement Coverage

As I noted earlier, we did not review California's implementation of its worker protection program, and thus cannot draw conclusions about the adequacy of the enforcement coverage previously provided to workers in California under the state program or currently provided under OSHA. Nevertheless, there have been changes in the enforcement structure for private sector enforcement efforts in California and a decrease in the number of inspections. The enforcement structure changes that may have resulted in a decline in coverage are (1) standards and exposure limits protecting workers that are less comprehensive under federal regulations than under California rules and (2) federal legislation that is less stringent than that of California, as shown in the following chart.

GAO California: Enforcement Structure

California Standards Are More Comprehensive

- Standards for many more activities and practices
- Over 2,400 safety standards rather than about 700 under OSHA
- Exposure limits for 597 airborne hazards instead of 392
- Stricter exposure limits for 100 hazardous substances

California Legislation Is More Stringent

- Civil penalties can be higher
- Criminal prosecutions possible in more circumstances
- Could act more promptly on imminent hazards

Under OSHA, workers in California no longer have the benefit of all the occupational safety and health standards and exposure limits developed by and adopted in the state program. States are allowed to develop different or additional standards so long as they are at least as stringent as those of OSHA. California standards generally are more comprehensive, are broader in scope, and cover more potential worksite hazards than federal standards.

California has over 2,400 occupational safety standards (excluding those related to mine safety), compared with OSHA's approximately 700 standards. Although part of the difference in the number of standards can probably be explained by the way requirements are organized into separate standards, it also reflects the fact that California's safety standards cover numerous industry activities and practices not specifically mentioned in OSHA standards. For example, petroleum drilling, a major hazardous industry in the state, is covered by comprehensive standards in California but is not covered specifically by any federal standard.

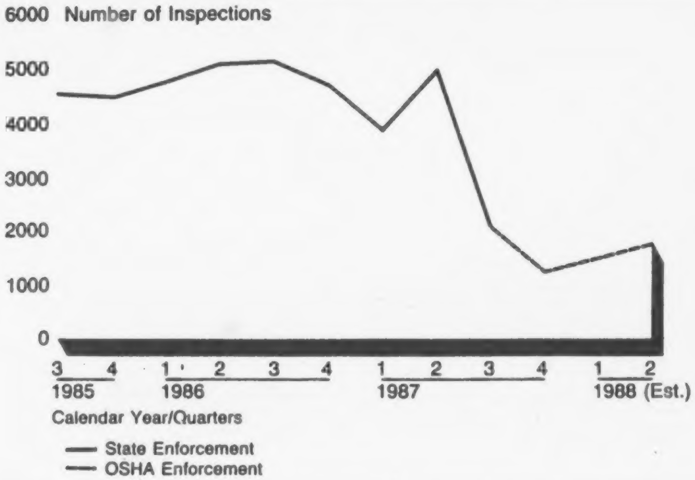
California's health standards are also more comprehensive. For example, the state has a health standard for permissible exposure limits for 597 hazardous airborne contaminants--over 200 more than the 392 addressed in OSHA's standard. For another 100 substances, the exposure level defined as hazardous in California is lower than the level considered hazardous by OSHA. Of these 100 substances with stricter exposure levels, 21 are carcinogens to which approximately 1 million California workers are exposed.

One of the most significant differences between the California program and the federal program is in the legislation. California's legislation, for example, authorizes higher maximum civil penalties, allows criminal prosecution under a much broader set of circumstances, and allows more prompt action on imminent hazards. In the construction industry, it also requires a permit for certain hazardous work. More specifically,

- certain civil penalty assessments allowed under California law are double that allowed under federal legislation (for example, a maximum of $20,000 for each single serious and willful violation compared to $10,000);
- California law permits criminal prosecution under a broader set of circumstances, which may be one factor explaining why over 250 cases have been prosecuted since 1973 for safety and health violations as compared to only 14 such prosecutions nationwide under federal legislation since 1970;
- under California law, an inspector can immediately shut down work where an imminent hazard exists, while federal law requires a court injunction; and
- California legislation requires a permit prior to initiation of certain hazardous construction work--which allows for the review of contractors' safety plans and the scheduling of inspections to monitor compliance at these hazardous locations--but OSHA has no comparable system. A 1982 California government study cited the permit system as one of the major reasons for the significant decline in injuries and fatalities from ditch, trench, and excavation cave-ins during the 1970's.

As the following chart shows, the number of private sector safety and health inspections in California has decreased substantially since OSHA began enforcement and is expected to remain at about a third of the previous level through at least fiscal year 1988. From July 1985 through June 1987, the state inspectors conducted an average of 4,672 private sector inspections a quarter. In contrast, OSHA performed 2,059

GAO California: Fewer Safety and Health Inspections



inspections in July through September of 1987 and 1,211 in October through December. It expects to conduct between about 1,500 and 1,700 a quarter through the rest of fiscal year 1988.

The smaller number of inspections is due in part to reduced staffing levels. As of February 26, 1988, OSHA had 158 employees (128 permanent and 30 on detail from other OSHA offices) working in California. Although OSHA was in the process of filling 36 more positions, the number on the job at that time was markedly less than the 271 state program staff in compliance enforcement as of December 1986.

Disruption In OSHA's Enforcement Efforts

Assumption of enforcement responsibility in California has led to a substantial disruption in OSHA's program efforts nationwide, as shown in the following chart. The former Secretary of Labor, in a letter to Senator Hatch in October 1987 (published in the Congressional Record) stated that OSHA had provided worker protection in California on an interim basis

GAO

OSHA Enforcement Disrupted To Send Staff to California

One third of all inspectors & supervisors detailed there	• 373 out of 1,100 detailed to California • Temporary duty 2 weeks to 4 months
Extra costs covered by funds already available for the state	• $3.5 million reallocated
Other worker protection activities curtailed to maintain national inspection level	• Completed only 43 of 62 scheduled internal audits

through the temporary shifting of staff to California from other parts of the country, but that it had been accomplished at a "great cost and at the great expense of worker protection elsewhere in the nation."

OSHA estimates that by June 1988 about a third of its 1,100 inspectors and supervisory staff will have been detailed to California for temporary tours of duty. During the first 6 months (June 15 through December 18, 1987), 292 inspectors and supervisors were detailed to California for periods ranging from 2 weeks to 4 months from its 9 other regional offices. OSHA plans for detailing another 81 inspectors and supervisory staff from January through May of 1988 will bring the total to 373 inspectors and supervisors detailed to California at some time since June 15, 1987.

As the former Secretary of Labor noted, it is costly to maintain staff and lease space and equipment on a temporary basis. OSHA used the $3.5 million remaining in grant funds that would have gone to California as the federal share of its program for the fourth quarter of fiscal year 1987 to cover the increased costs. We were informed that these funds were sufficient to cover the additional costs, such as travel and office space rental.

While the diversion of staff resources has, according to OSHA officials, had certain negative effects on program activities nationwide, the overall number of OSHA inspections has been maintained. OSHA told us that the number of inspections has been maintained by using staff from other program areas, such as the voluntary protection program, the consultation program, state monitoring, and internal audit. The effect on the internal audit function, for example, is shown by their having performed in fiscal year 1987 only 43 of the 62 scheduled area and regional office audits.

OSHA is attempting to fill California staff positions with permanent employees, but has been hampered by potential employees' reluctance to accept positions while the federal program's status is uncertain. In addition, for former state employees--a likely applicant pool--comparable positions with OSHA would mean a salary reduction since employees in the state program had, on average, about 20 percent higher salaries. Of the permanent positions filled as of February 26, 1988, 52 were filled from within OSHA, while 4 were formerly with the California program, and 72 were hired from elsewhere.

By May 1988, OSHA expects to be operating in California with a permanent staff of 164. In fiscal year 1988, total funding for public and private sector worker protection in California is expected to decline from $33 million to $16 million. This represents a decline from $19 million to $3 million in funds from California and from $14 million to $13 million from OSHA.

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Mr. Chairman, this concludes my prepared statement. My colleagues and I will be pleased to answer any questions you and the other members of the Committee may have.

The **Chairman**. Can we get assurance about whether OSHA will publish a permanent standard on bloodborne diseases? We will not have a chance to get all the way through that, but we had important and impressive testimony from your scientists, I believe, that there is sufficient information to be able to develop a standard.

What we want is a permanent standard put into effect, not guidelines or other types of——

Mr. **Baroody**. Senator—I am sorry, Senator.

The **Chairman**. Mr. Pendergrass, can we get assurances on that?

Mr. **Pendergrass**. Mr. Chairman, we started this process a year ago, as I mentioned in my opening statement. We have published an ANPR; we have collected data as a result of that; it is being evaluated, and depending on what the evaluation is, we will either issue a permanent standard or not.

If the scientists feel that this is their recommendation, that is certainly going to be taken into consideration.

The **Chairman**. Well, this is what Dr. Harwood—you are familiar with Dr. Harwood at your agency——

Mr. **Pendergrass**. Yes.

The **Chairman**. She is a leading medical science expert in OSHA.

Dr. Harwood says: "Well, I have observed the Department of Labor policymakers for a long time, and I see how they behave when they want to stall and when they want to go forward; and based on that, and based on the things I have testified to today, I would say they are delaying."

Just before that—I will find the reference in the testimony—Dr. Harwood said:

> I feel that the hospital and the laboratory are workplaces in the same sense that the steel mill and the factory are workplaces, and I think these viruses are occupational hazards in the same sense that asbestos and benzene are occupational hazards. People get infected at work, people get sick, people die. And I think the only way that they can be protected is if OSHA issues a permanent standard.

And then, when asked whether there was sufficient information to make a standard, she indicated that there was. I will try and get the exact quote, but I will certainly circle it for you and send it to you if staff is not able to come up with it.

What I am interested in finding out is whether you will publish a permanent standard on bloodborne diseases. You have your scientist, who reviewed with us the time she spent down at CDC to review the various materials. She indicated as somebody who is a career employee that it was possible to start the process, move the process along and develop a permanent standard for bloodborne diseases. And I just want to find out now whether you will give us the assurances.

The Chairman asks:

> During all this time, you believe the agency had enough information to publish a proposal for a bloodborne disease standard back in March of 1987, when you made an initial recommendation to the Assistant Secretary; is that correct?
>
> Answer. That is correct.
>
> Question. Would we be closer to having a permanent standard today if the agency had followed your recommendation?

Dr. Harwood responds: "Yes, we would."

What are you going to do, Mr. Pendergrass? What assurances can you give not just this Committee and me, but to the American people as to whether you are going to give this priority?

Mr. PENDERGRASS. The bloodborne disease evaluation has top priority. We certainly are anxious to get a full evaluation of all of the aspects of the proposal, and we will act on that.

Mr. Chairman, we can keep you informed of the process, of the progress we make, if you would like.

The CHAIRMAN. Well, what are you going to do? There is obviously a feeling among the top scientists who are working in these areas, and this is enormously important, in terms of AIDS and Hepatitis B. As Chairman of the Committee, we passed out a bill out of this Committee which the Senate is going to consider in the next several days, S. 1220, dealing with AIDS, and it concerns not only the research and education but also talks about training of health workers. We need that kind of scientific competency, and you've got it—you've got it.

And I don't know the background of Dr. Harwood, but she impressed me as someone in whom I would have a good deal of confidence in at least moving this process along and getting it going forward. Instead, she testified yesterday that she knows when delay is in the air, and that is certainly, from her own testimony, the case.

We want to know whether you are going to do it, yes or no, a permanent standard for bloodborne diseases. Are you going to do it, yes, and when?

Mr. PENDERGRASS. It is an active process, Mr. Chairman. I regret that Dr. Harwood feels that there is delay. I don't think so. And we will proceed, and as I said, we will keep you informed of the progress; we would be very happy to do that. And I agree with you, this is an important matter.

The CHAIRMAN. Well, I agree with you, and this is an important matter, and we will keep you informed is not the same as saying yes, we are going to get a permanent standard on bloodborne diseases, on Hepatitis B, on AIDS; we are going to get it as fast as we can; we are going to comply with the law; it is going to have our top priority, and we will let you know every step along the way that that is what we are going to do, and I am going to try and have that thing done faster than we have ever been able to achieve one—but I can't give you an exact date. Now, why can't you just say it that way?

Mr. PENDERGRASS. Well, I can't give you an exact date, nor can I give you an exact statement as to what is going to be proposed or how long it is going to take to have hearings and all of the other aspects. Certainly, the work that has been done to date is an important part of it. Dr. Harwood's activities are very important, and she has had an active role and will continue to have an active role.

Mr. BAROODY. Mr. Chairman, if I may, if we had had this hearing six months ago—and John, please correct me if I am wrong—and you had made the same request and insistent demand, and John had acted faster than they had ever acted and put in place a rule that would have codified the CDC guidelines five months ago, we would be back in proposal stage now because, if I heard you right yesterday, John, the CDC guidelines were revised two weeks ago.

We think that OSHA has taken more than a delaying tactic here; at the same time they announced they would embark on this process, they said they would enforce, with more than just 5(a)(1); they also repaired to the personal protective standard in their Code.

The CHAIRMAN. Well, I would just say that that is a woefully inadequate response. We all know that with regard to the AIDS virus that there is going to be more and more that is going to be learned; scientists are learning more and more about it; we are going to have to continue to do a great deal in terms of research; we are going to have to try and give assurances to hundreds of thousands of public health workers.

We understand this is going to be an evolving process. We understand that you are going to have to make adjustments and changes. But we are going to admire you when you say this is the best science that we had, this is what we did; we have got new science, so we want to go further on this thing, because there is new science.

The Centers for Disease Control has been extraordinarily constructive and positive. General Koop has been extraordinarily courageous in providing leadership. And for you to say that we cannot because we are going to get different science next year is ducking it, it really is. You are putting at risk a lot of people's lives.

Mr. BAROODY. No, quite the contrary——

Mr. PENDERGRASS. Mr. Chairman, no, we are not. Mr. Chairman, we are enforcing the CDC guidelines today.

Mr. BAROODY. And we arrived at that decision——

The CHAIRMAN. You know, Mr. Pendergrass, or you should not be sitting where you are, that that isn't the same as a rule. You know it isn't.

Mr. BAROODY. It is not the same as a rule——

The CHAIRMAN. So don't suggest, do not suggest that that has the power, that that possibly has the power to grant the kinds of protections which your agency can provide. And I am telling you what I think, and that is you ought to put this on a fast track. The country is concerned about it. There is a great deal of confusion, there is a great deal of fear, and there is enormous anxiety. And to have a business-as-usual attitude on this—that is what you are saying.

All you have to do is say—will you give it a priority?

Mr. PENDERGRASS. It has priority.

The CHAIRMAN. Will you commit here and now that you will give us a rule, that the agency, OSHA, will? Can you tell us that? Yes or no?

Mr. PENDERGRASS. I don't have all the information I need to make that commitment at this time.

The CHAIRMAN. I am not asking you to make that rule today.

Mr. PENDERGRASS. We are on a fast track, but more importantly, we are providing protection in the workplace today based on the CDC guidelines.

[Information supplied for the record follows:]

RESPONSE OF MR. PENDERGRASS TO SENATOR KENNEDY QUESTION ON THE OSHA AGENCY

On July 7, 1987, the Departments of Labor (DOL) and Health and Human Services (HHS) joined forces to develop an extensive plan regarding occupational exposures of health-care workers to bloodborne diseases. On October 30, 1987, DOL and HHS issued a joint advisory notice to inform health-care and other affected employers of existing guidelines for bloodborne diseases. These include voluntary guidelines issued by OSHA in 1983 to reduce the risk of occupational exposure to employees in health-care facilities from the hepatitis B virus (HBV); guidelines for HBV vaccination and post-exposure prophylaxis issued by the Centers for Disease Control (CDC); and CDC guidelines for reducing occupational exposure to human immunodeficiency virus (HIV).

Last year, OSHA notified 500,000 health-care employers, including hospitals, that it would be enforcing CDC guidelines through existing, applicable OSHA standards. Between September 1987 and April 15, 1988, OSHA conducted 59 inspections in health-care facilities. While most of the facilities inspected were found to be in compliance with the guidelines, OSHA issued citations to nine employers. In FY 1988, OSHA plans to conduct about 100 inspections in health-care facilities to ensure compliance with CDC guidelines.

On November 27, 1987, OSHA issued an Advance Notice of Proposed Rulemaking which invited interested parties to submit data, comments and other pertinent information regarding OSHA's development of a proposed standard for occupational exposure to HBV and HIV. I am still reviewing the information we gathered pursuant to that Advance Notice.

The **Chairman**. I asked Dr. Harwood: "And can OSHA require employers to provide the newly-developed Hepatitis B vaccine free-of-charge to health care workers under the guidelines?"

Dr. Harwood responded: "I don't think they can. I think it would be quite difficult under General Duty to provide that."

So, we have heard that that can provide extraordinary protections. You cannot do it under the guidelines, you can under a rule; you won't give us the rule or indicate that you will give it to us. And we have hundreds of workers who are at risk today.

And I want to tell you, even though you will not give that, we are going to continue to have you up here, and we are going to have you up here frequently, to find out what is going on on this, because the public health workers need it, those who are involved in hospitals deserve it. The best scientific information that is available can grant increased kinds of protections, and we are going to insist that this agency move ahead.

This concludes the last of three days of oversight hearings on the Occupational Safety and Health Administration. We said at the outset of these hearings that the record would show that the decision to let workers die while waiting on standards to protect and save their lives has been made at the highest levels of the Administration, and the record showed yesterday and today that Vice President Bush has personally supervised and pushed the effort to roll back health protection for workers.

I said at the outset of these hearings that the record would show the Administration created a superstructure of procedural barriers to the creation and enforcement of needed standards.

Yesterday we heard testimony from one dedicated health professional that you needed to have strong masochistic tendencies to work in this agency, because the Administration makes it so hard to do what the law requires. And another told Senator Metzenbaum that it is hard to sleep at night, knowing that workers are dying while the Office of Management and Budget delays needed action.

We have seen a parade of horribles. We have seen the lives of working men and women cut short. We have seen a policy of industrial mayhem, masquerading as cost-benefit analysis that seems to impose nothing but costs on workers and benefits on business.

As I have said, ours is not a perfect world, but the indictment today is not against accidents. The complaint today is with an agency and the leadership in it who haven't done anything accidentally; they have deliberately chosen to undermine, ignore and trim, and to abuse the law. There are thousands of Americans whose lives are not receiving protection from industrial accident and disease by bureaucratic inaction and malfeasance.

The Committee stands in recess.

[Whereupon, at 1:20 p.m., the Committee was adjourned.]